SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 802

JOHN C. LEWIS, AS RECEIVER OF THE HANCOCK NATIONAL BANK OF SPARTA, GEORGIA, PETITIONER,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	A	1
Caption (omitted in printing)	A	
Record from D. C. U. S., Middle District of Georgia	1	1
Caption (omitted in printing)	1	
Original bill in Superior Court of Hancock County	2	1
Exhibit "A"—Order of the Governor of the State of Georgia, appointing Hancock National Bank of Sparta a State depository	7	5
Exhibit "B"—Depository bond of The Hancock National Bank of Sparta for $10,000.00, dated July 12, 1928	8	6
Exhibit "C"—Resolution adopted at a meeting of board of directors of The Hancock National Bank of Sparta, held on July 12, 1928, accepting appointment as a State depository	10	7
Exhibit "D"—Order of the Governor of the State of Georgia instructing tax collector to deposit funds in the bank	10	8
Exhibit "E"—Assignment, State of Georgia to Fidelity & Deposit Co., dated July 28, 1932	11	8
Motion to dismiss	13	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1934

	Original	Print
Order sustaining motion to dismiss	14	11
Findings of fact and conclusions of law	15	11
Final decree	19	14
Petition for appeal and order allowing same	20	15
Bond on appeal (omitted in printing)	21	
Assignments of error	23	16
Præcipe for transcript of record	24	17
Clerk's certificate (omitted in printing)	26	
Recital as to citation	26	18
Minute entry of argument and submission	27	19
Opinion, Sibley, J.	28	19
Judgment	38	26
Motion for stay of mandate	39	27
Orders staying issuance of mandate	42	29
Clerk's certificate	43	30
Motion for substitution of party appellee	44	31
Order substituting party appellee	47	33
Order allowing certiorari	48	35

[fols. a–c] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

No. 176. In Equity

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Complainant-Appellant,

versus

W. K. HOWARD, as Receiver of the Hancock National Bank of Sparta, Georgia, Defendant-Appellee

[fol. 2] IN SUPERIOR COURT OF HANCOCK COUNTY

ORIGINAL BILL

STATE OF GEORGIA,
County of Hancock:

To the Superior Court of said County:

The petition of Fidelity & Deposit Company of Maryland (herein called the plaintiff) shows:

1. The plaintiff is a corporation created and organized under the laws of the State of Maryland; is engaged in the business of fidelity insurance; and is authorized and qualified under the statutes of the State of Georgia to become surety on bonds authorized or required under the laws of said State.

2. The defendant is W. K. Howard, of said county, in his capacity as receiver of the Hancock National Bank of Sparta, a banking institution organized as a National Bank, under the laws of the United States, with its principal office and place of business in said State and County.

3. On July 6, 1928, His Excellency, L. G. Hardeman, then Governor of Georgia, in pursuance of the statutes of said State, for such cases made and provided, designated and appointed said Hancock National Bank of Sparta as a state depository for the term of four years, from the 6th day of

July, 1928, to the 6th day of July, 1932, upon its giving bond in the sum of ten thousand dollars and on condition that said bank would pay semi-annually interest at the rate of 2% per annum, payable January 1st and July 1st of each year, on daily balances of public money or effects belonging to the State of Georgia and deposited with said bank, copy of said order being attached as Exhibit A, with leave of reference.

4. Said Hancock National Bank of Sparta accepted said appointment and on the 12th day of July qualified as such [fol. 3] state depository by filing in the office of the Governor, a bond in the form and manner prescribed by the statutes of said State, in which said bond said Hancock National Bank was principal and the plaintiff was surety, in the sum of ten thousand dollars, a copy of which is hereto attached and made a part hereof, with prayer for usual leave of reference, and marked Exhibit "B", and the resolution authorizing same attached as Exhibit C.

5. On July 31, 1928, said bond having been approved, said L. G. Hardeman, Governor as aforesaid, issued his executive order and proclamation declaring said bank a state depository, copy of same being attached as Exhibit D.

6. Deposits of money belonging to the State of Georgia and being taxes collected for said State by the Tax Collector of Hancock County, were deposited in said bank as a state depository.

7. On May 23, 1932, said Hancock National Bank of Sparta having become insolvent, the Comptroller of the Currency of the United States, in pursuance of the Acts of Congress for such cases made and provided, appointed a receiver, therefor, and said defendant is the receiver appointed by said Comptroller and is in possession and control, as such, of the business, the assets and properties of said Hancock National Bank of Sparta; and is now engaged in liquidating said assets in order that lawful claims against said bank may be paid.

8. At the time said bank failed and was taken over by the Comptroller of the Currency and the defendant as receiver as aforesaid, the State of Georgia had there a deposit of public funds belonging to said State in the amount of six thousand one hundred fifty-seven and 41/100

[fol. 4] ($6,157.41) dollars; and upon demand and refusal of said bank and the receiver in charge thereof to pay over the same to the State of Georgia, His Excellency, Richard B. Russell, Jr., Governor of said State, and M. L. Ledford, the State Treasurer of said State, made demand on the plaintiff as surety on the official depository bond aforesaid to pay to the State of Georgia said sum with the interest thereon.

9. On July 28, 1932, the plaintiff, in response to the demand of the Governor and the State Treasurer of said State, acting on behalf of the State of Georgia, paid to the State of Georgia the full amount of its said deposit of funds in said bank and the interest thereon in the total amount of six thousand two hundred twenty-one and 73/100 dollars ($6,221.73); and the said Governor and State Treasurer, in behalf of said State, duly assigned to the plaintiff its claim against said bank and contracted that the plaintiff should be entitled to all the rights of the State of Georgia in respect of said deposit. Copy of said assignment is attached as Exhibit E, with prayer for the usual reference.

10. It is provided in the laws of said State (Political Code 1252) that bonds given by banks appointed as state depositories "shall have the same binding force and effect as the bond required by law to be given by State Treasurers;" and it is provided in said laws (Political Code 218) in respect of the bond of the State Treasurer that "a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof;" and under the statutory enactments, as construed and applied by the Supreme Court of this State, [fol. 5] a lien arose in favor of the State of Georgia upon all the property of said bank, to the amount of said bond, from the date of the execution thereof, as respects all public funds of the State on deposit therein.

11. The legal remedy for the enforcement of said lien would be by the issuance of execution by the Governor for the amount due to the State and the levy thereof on the property of said bank, but all the property of said bank, being in the hands of the defendant, as receiver as afore-

said, is not subject to levy and sale by such process; and for lack of a adequate remedy at law it is necessary to sue in equity to enforce the same.

12. The plaintiff, upon its having, as surety on said bond, discharged the State's claim against said bank in full, by said act became entitled by subrogation, as well as by the formal transfer to it aforesaid, to all of the State's rights as against said bank and its properties.

13. The plaintiff has caused its claim to be duly presented to said defendant as receiver and has demanded of said receiver that he recognize the lien existing on said assets of said bank in his hands, but said receiver, while recognizing that the plaintiff is a creditor of said bank to the extent aforesaid, denies that the lien aforesaid is enforceable against the properties of said bank in his hands, and, acting under instructions of the Comptroller of the Currency, has refused to recognize any rights of the plaintiff under its lien as aforesaid or to pay its claim in priority of payment before distributing the assets of said bank or the proceeds thereof in ratable dividends to such ordinary creditors of said bank as shall prove their claims. The amount of all the properties and assets of such bank [fol. 6] is not such as to discharge all claims proved against it, and unless the lien herein asserted by the plaintiff be recognized and enforced against the properties of said bank in the hands of defendant as receiver aforesaid, it will lose all or the greater part of its said debt,

Wherefore, the plaintiff prays:

(a) That the Court do find, declare and decree that the plaintiff has, as against said bank and the defendant, as receiver as aforesaid, a lien ranking in priority according to the date of said bond, on all the properties of said bank now in custody or control of said defendant as receiver as aforesaid, and the proceeds of all of the assets of said bank which came into his custody and control by virtue of said receivership, for the amount of the debt of the State of Georgia against said bank, which it (the plaintiff) as surety as aforesaid has discharged and paid off, and for interest thereon.

(b) That the Court by judgment and decree do order and instruct said receiver that out of the assets of said

bank or the proceeds thereof he do pay off and discharge said lien and the debt thereby represented, making ratable distributions to the other creditors of said bank which have no lien or other right to priority of payment.

(c) That the Court do grant such other and further relief and remedy as may be legal, equitable, just and/or appropriate in the premises.

(d) That process do issue requiring the defendant to appear at the next term of this Court to answer this complaint.

(Signed) Little, Powell, Reid & Goldstein, Plaintiff's Attorneys, 1608-22 Marietta St. Bldg., Atlanta, Ga.

[fol. 7] EXHIBIT "A" TO ORIGINAL BILL

State Depository

STATE OF GEORGIA,
Executive Department, Atlanta:

By authority of an Act of the General Assembly entitled "An Act to establish State Depositories in certain cities in this State" approved October 16, 1879, and all Acts amendatory thereof, and codified as sections 1249 et seq. of Vol. 1, of the Code of 1910, and acts amendatory thereof, it is

Ordered: That the Hancock National Bank of Sparta, a bank located in the City of Sparta be and the same is hereby appointed a State Depository for the term of four years from the sixth day of July, 1928, and that upon the execution by said Bank of a good and solvent Fidelity bond in the sum of Ten Thousand Dollars, to be approved by the Governor, an order be issued and published in the city where said Bank is located, designating the counties whose Tax Collectors and other officers shall be instructed to pay into said Bank, all money collected by them for or on account of State taxes; except such as may be paid directly into the State Treasury.

This appointment as State Depository is made, however, upon the condition that said Bank will pay semi-annually, until further order, interest at the rate of two per cent

per annum, and provided that said rate may from time to time be increased by order of the Governor, not to exceed three per cent. per annum, payable on the first days of January and July of each year, on daily balances of public money or effects belonging to the State of Georgia, and deposited with said Bank, as provided by law, and make no charges against the State for exchange on such money so [fol. 8] deposited, or for the transmission of currency to the State Treasury, when directed so to do by the State Treasurer.

This 6th day of July, 1928.

(Signed) L. G. Hardeman, Governor. By the Governor: Mattie H. Carrington, Secretary Executive Department.

EXHIBIT "B" TO ORIGINAL BILL

GEORGIA,
Hancock County:

Know all men by these presents, that we The Hancock National Bank of Sparta, Georgia, as Principal, and The Fidelity & Deposit Company of Maryland a solvent Surety Company admitted to do business in the State of Georgia, as Surety, are held and firmly bound unto his Excellency, L. G. Hardeman, Governor of said State, and his successors, in office in the sum of Ten Thousand Dollars, for the payment of which, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seal and dated, this 12th day of July, A. D. 1928.

The condition of the above bond is, that whereas, the said Hancock National Bank of Sparta, a Bank incorporated by the laws of *the* Georgia and doing business in the City of Sparta, Georgia, was on the 6th day of July, 1928, duly appointed by the Governor of said State, Depository for the term of four years from July 6th, 1928, under and by virtue of the Act of the General Assembly of said State, entitled "An Act to establish State Depositories in the cities of Atlanta, Athens, Augusta, Columbus, Macon, Savannah, [fol. 9] Rome, Americus, Albany, Lagrange, Gainesville, Griffin and Hawkensville, and to prescribe their duties," approved October 16, 1879, and the several Acts amend-

atory thereof and codified as Sections 1249 et seq. of Vol. 1 of the Code of 1910, and Acts amendatory thereof; and whereas, the said Bank has duly accepted said appointment, and is about to enter upon the discharge of its duties as such Depository, in accordance with resolutions of the Board of Directors, which are hereunto appended.

Now, if the said Bank shall faithfully perform all such duties as shall be required of it by the General Assembly, or the laws of this State and shall faithfully account for all the public money or effects that may come into its hands during its continuance in office, then said bond shall be void, otherwise, of full force.

In witness whereof, the said the Hancock National Bank of Sparta, Georgia, as principal, has, by its President hereunto set its hand and seal, and the said Fidelity & Deposit Company of Maryland, as Surety, have hereunto set their hands and affixed their seals, on this, the day and year first aforesaid.

Signed, sealed and delivered in presence of:

The Hancock National Bank of Sparta, by M. W. Harris, President. Fidelity & Deposit Company of Maryland, by Edwin R. Haas, Agent. H. A. Berry, N. P. H. Co. Ga., Lindley W. Bode, as to Surety.

[fol. 10] EXHIBIT "C" TO ORIGINAL BILL

Office of The Hancock National Bank of Sparta, Georgia

Sparta, Ga., July 12th, 1928.

Whereas, on the 6th day of July, 1928, the Hancock National Bank of Sparta, Georgia, was by authority of law, appointed by the Governor a State Depository, for a term of four years from the 6th day of July, 1928, upon the giving by said Bank a good and solvent bond in the sum of Ten Thousand Dollars, therefore, be it

Resolved, that said appointment be accepted, and the Board of Directors of said Bank hereby authorize and instruct M. W. Harris, President, to execute a good and solvent bond in the sum of Ten Thousand Dollars, payable to the Governor of Georgia, and his successors in office, in

order to carry out and put into effect the appointment of said Hancock National Bank of Sparta, Ga., as a State Depository.

(Signed) M. W. Harris, President of said Bank. (Seal Bank.) Attest: S. H. Hollis, Secretary Board of Directors.

At a meeting of the Board of Directors of The Hancock National Bank of Sparta, Ga., a quorum being present, the above and foregoing resolution was adopted, the same being a true copy thereof.

This 12th day of July, 1928.

(Signed) S. H. Hollis, Cashier. (Seal Bank.)

EXHIBIT "D" TO ORIGINAL BILL

STATE OF GEORGIA,
Executive Department, Atlanta:

The Hancock National Bank of Sparta located in the City of Sparta, having been appointed a State Depository, [fol. 11] and having executed and filed in this office a bond in the sum of Ten Thousand Dollars, conditioned for the faithful discharge of its duties, which has been accepted and approved by the Governor, it is therefore

Ordered: That the Tax Collector of the County of Hancock be and he is hereby instructed to pay over to said bank all moneys collected by him for and on account of State taxes, except such as may be paid directly into the State Treasury and that notice of this order be given by publication in some newspaper of general circulation published in the City where said bank is located.

This 31st day of July, 1928.

(Signed) L. G. Hardeman, Governor. By the Governor: Mattie H. Carrington, Secretary Executive Department.

EXHIBIT "E" TO ORIGINAL BILL

In consideration of payment to the State of Georgia of the sum of Six Thousand One Hundred Fifty Seven and

41/100 ($6,157.41) as principal, and $71.32, as interest, the State of Georgia, acting through the undersigned, M. L. Ledford, as State Treasurer, and Richard B. Russell, Jr., as Governor, and in behalf of the State of Georgia, acknowledge payment in full of the monies deposited by the State of Georgia in the account of M. L. Ledford, as Treas-
[fol. 12] urer of the State of Georgia, in the Hancock National Bank of Sparta, Georgia, the amount of said deposit being said sum of $6,157.41, and lawful interest to this date being the sum of $71.32, the payment of both sums by the Fidelity & Deposit Company being hereby acknowledged, said payment being made because of the liability of said Fidelity & Deposit Co., as surety on its certain bond No. 3463845, given by Hancock National Bank of Sparta, Georgia, Principal, as a lawful depository, and Fidelity & Deposit Company, as Surety.

Said surety having paid to the State of Georgia in full the liability of the principal, now in consideration thereof the said State of Georgia transfers, conveys and assigns to said surety, Fidelity & Deposit Company, all of the right, title and interest of the State of Georgia, and/or of the Governor of Georgia, and/or of the Treasurer of Georgia, in and to all funds of the State of Georgia, or of the Treasurer of the State of Georgia, on deposit in said Hancock National Bank, including all rights to preference and all rights to liens which may exist on account of said funds, this assignment being intended to convey to the surety, the Fidelity & Deposit Company, all such rights, preferences, liens and claims which may exist on account of said funds, and said deposits, and the said Fidelity & Deposit Co., being authorized to file such claims or proceedings as may be necessary and proper to obtain payment to itself of such sums as may be due on account of such funds and deposits, with the right to proceed in the name of the State of Georgia, and/or M. L. Ledford, Treasurer of said State, and/or Richard B. Russell, Governor of Georgia, and his successors in office, for the use of said Fidelity & Deposit Company, if it deems same proper, such actions or proceedings so brought to be without cost or expense to the State of Georgia.

[fol. 13] In witness whereof, the Treasurer of Georgia and the Governor of Georgia have severally set their official

hands and caused their official seals to be affixed, this 28th day of July, 1932.

(Signed) M. L. Ledford, as Treasurer, State of Georgia. (Seal.) (Signed) Richard B. Russell, Jr., as Governor of Georgia. (Seal.)

(Filed in office Nov. 26, 1932, W. B. Dickens, Clerk).
Filed April 24, 1932.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 11, 1933

Comes now W. K. Howard in his official capacity as Receiver of the Hancock National Bank of Sparta, the defendant in the above stated cause in equity, and files his motion to dismiss plaintiff's petition thereon on the following grounds:

1

Plaintiff's petition, insofar as it seeks to enforce a lien against the assets of the Hancock National Bank in the hands of this defendant as receiver, sets out no valid cause of action against this defendant.

2

There is no equity in plaintiff's petition.

3

The execution on the 12th day of July, 1928, by the Hancock National Bank of the depository bond referred to in paragraph 4 of plaintiff's petition was without authority of law and contrary to public policy.

[fol. 14]

4

The execution of said bond was beyond the charter power of said Hancock National Bank.

5

The execution of said bond did not have the effect of creating a valid lien in favor of the State of Georgia upon the assets of said bank.

Wherefore, Defendant prays that his said motion be sustained.

Sam H. Wiley, Miller & Lowery, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO DISMISS—Filed July 8, 1933

The defendant, W. K. Howard, as Receiver of the Hancock National Bank of Sparta, having filed a written motion to dismiss plaintiff's petition in the above stated case, and said motion coming on regularly to be heard, after argument had for both plaintiff and defendant,

It is considered, ordered, and adjudged that said motion be, and the same is, hereby sustained, and said petition insofar as it seeks to establish a lien in favor of plaintiff on the assets and/or properties of the Hancock National Bank of Sparta in the hands of said Receiver is hereby dis-[fol. 15] missed. However, said petition is retained for the sole purpose of allowing plaintiff to establish its claim as a general creditor of the bank.

So ordered and adjudged in open Court this July 7, 1933.

Bascom S. Deaver, U. S. Judge.

Exception noted and allowed. July 7, 1933.

Bascom S. Deaver, Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 31, 1933

The defendant in the above stated cause having duly filed his written motion to dismiss the petition of the plaintiff in said cause, and the same having come on regularly for hearing before me on July 7, 1933, after argument had, I sustained said motion to dismiss said petition insofar as said petition seeks to establish a lien in favor of the plaintiff on the assets and/or property of the Hancock National Bank of Sparta in the hands of said Receiver, and dismissed the petition insofar as it seeks to establish such a

lien, but retained the petition, however, for the purpose of allowing the plaintiff to establish its claim as a general creditor of the bank, and entered a judgment to that effect on July 7, 1933.

And now the cause being submitted to me upon the petition and a stipulation by the defendant made in open Court that the allegations of fact contained in said petition are [fol. 16] true, except the allegation that Hancock National Bank of Sparta qualified as a State depository by filing in the office of the Governor a bond in the form and manner prescribed by the statutes of Georgia, and the allegation that a lien arose under the statutory enactments embodied in No. 1252 and 218 of Georgia, upon all the property of said bank to the amount of said bond, from the date of the execution thereof as respects all public funds of the State on deposit therein; defendant admitting however, that the bond, in the form and manner prescribed by the statutes of Georgia for State depository bonds, set forth in plaintiff's petition, was executed on July 12, 1928, by the officers of said bank and filed in the office of the Governor, the Court finds the following facts:

1

Fidelity & Deposit Co. of Maryland, is a corporation organized under the laws of the State of Maryland, authorized and qualified under the statutes of Georgia to become surety on bonds authorized or required by the laws of said State.

2

On July 6, 1928, L. G. Hardeman was the duly elected and qualified governor of the State of Georgia and he did on said date, appoint Hancock National Bank of Sparta, Ga., as the State depository. The exhibit of said proclamation marked Exhibit A, and attached to said bill is a true and correct copy of the original proclamation.

3

M. W. Harris, was the duly elected president of the Hancock National Bank of Sparta, on the 6th day of July, 1928, [fol. 17] S. H. Hollis, was secretary of the board of directors and M. W. Harris executed the bond sued on in this case as president of said Hancock National Bank of Sparta.

4.

A meeting of the board of directors of the Hancock National Bank of Sparta did on the 12th day of July, 1928, authorize M. W. Harris to execute the said bond and to attach thereto the seal of the said Hancock National Bank.

5

At the time the Hancock National Bank of Sparta, Ga., was declared insolvent, there was on deposit in the name of M. L. Ledford, Treasurer, of the State of Georgia, the sum of $6,157.41.

6

The said sum represented taxes due the State of Georgia that had been collected in Hancock County and were deposited in said bank by the said treasurer in his name as aforesaid.

7

Fidelity & Deposit Co. of Maryland, the plaintiff herein, paid to the State of Georgia, $6,157.41, as principal and $48.59, as interest.

8

The State of Georgia, by Richard B. Russell, Jr., as Governor, and M. L. Ledford as Treasurer, did assign to the Fidelity & Deposit Co., the rights of the State of Georgia [fol. 18] against said Hancock National Bank and its receiver, in the manner and form set out in the assignment attached to the bill, which I find to be a true copy of the original.

9

The receiver has paid to Fidelity & Deposit Co., no part of said sum of $6,157.41.

Conclusions of Law

Upon the foregoing facts, I conclude:

(a) Fidelity & Deposit Co., by subrogation and by transfer, is entitled to all of the right vested in the State of Georgia, to said $6,157.41.

(b) The said plaintiff herein, Fidelity & Deposit Co., is not for any reason entitled to priority of payment out of the assets in the hands of the receiver.

(c) Fidelity & Deposit Co., is entitled to assert against the receiver, a claim for $6,157.41, as principal and $48.59, as interest, to date said bank closed, as a general claim and that the receiver should pay to Fidelity & Deposit Co. on said claim the pro rata dividends declared by the Comptroller of Currency for distribution to general creditors.

This 31 day of July, 1933.

Bascom S. Deaver, U. S. Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed July 31, 1933

The findings of fact and conclusions of law having been announced in the above stated case, it is considered, ordered and decreed, that the petition of plaintiffs herein, insofar as it seeks to establish a lien upon the property of the Hancock National Bank in the hands of the receiver, be and the same is hereby denied.

It is further ordered and decreed, that neither the State of Georgia nor the Fidelity & Deposit Company of Maryland, has any right to assert a claim for lien or security in any manner or form against the assets of the said Hancock National Bank in the hands of the said receiver and has no priority or right to preference against any assets of the bank in the hands of its receiver on any of the grounds asserted in the bill of complaint.

It is further ordered and decreed, that the claim of Fidelity & Deposit Company of Maryland, as transferee and assignee of the State of Georgia, be and the same is hereby allowed for the amount of $6,206.00, being principal and interest, as a claim of a general creditor, to be paid pro rata with all other general creditors of Hancock National Bank, in accordance with the provisions of law relating to the liquidation of national banks by the Comptroller of Currency.

It is further ordered and decreed, that all costs of this proceeding be taxed by the clerk of this Court against the plaintiffs.

So ordered and decreed this 31 day of July, 1933.

Bascom S. Deaver, United States Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

No. 176 In Equity

FIDELITY & DEPOSIT CO. OF MARYLAND, Complainant,

vs.

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Defendant

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Aug. 5, 1933

To the Honorable Bascom S. Deaver, Judge of the District Court of the United States for the Middle District of Georgia:

Fidelity & Deposit Company of Maryland, complainant, feeling aggrieved by the orders and decrees rendered and entered in the above entitled cause on the 31st day of July, 1933, does hereby appeal from the final decree of July 31, 1933, to the United States Circuit Court of Appeals, Fifth Circuit, for the reasons set forth in the assignment of errors herewith filed, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, Fifth Circuit, under the rules of said Court in such cases made and provided;

And your petitioners further pray that a proper order relating to the required security to be required of them to be made.

Fidelity & Deposit Company of Maryland, Complainant. M. F. Goldstein, by Little, Powell, Reid & Goldstein, Solicitors of Record.

[fols. 21 & 22] Considering the foregoing petition this day presented, it is ordered that the appeal be allowed to the complainant in the above entitled and numbered cause, from the decree rendered against it herein; this said appeal shall be returnable to the U. S. Circuit Court of Appeals for the 5th Circuit; and that plaintiff shall give bond in the sum of One Thousand ($1,000.00) Dollars in the terms

of law; and that a transcript of the record be filed in the U. S. Circuit Court of Appeals according to law, as prayed for.

Granted, this 5 day of August, 1933.

Bascom S. Deaver, United States Judge.

Bond on Appeal for $1,000, approved and filed Aug. 5, 1933, omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Aug. 5, 1933

The complainant-appellant, Fidelity & Deposit Co., of Maryland, in this action, in connection with its appeal, makes the following assignments of error which it avers occurred, upon the trial of the cause, to-wit:

1

Because the Court erred in the ruling made and entered in the cause July 7, 1933, sustaining the motion of the respondent and dismissing so much of complainant's bill as sought a lien upon the assets in the hands of the Receiver (respondent herein), for the amount of the deposit by the Treasurer of the State of Georgia in said bank, thereby refusing to give any force, effect or validity to the terms of the depositary bond given by the Hancock National Bank (of which respondent is Receiver), as provided for by the statute laws of Georgia, in force when said bond was given and at all times when said deposit was received, the said complainant being entitled to receive and obtain the full force and benefit of the said lien in the liquidation of a national bank to the full amount of the deposit made by the State of Georgia.

2

Because the Court committed error in holding (conclusions of law filed July 31, 1933):

"The said plaintiff herein, Fidelity and Deposit Co., is not for any reason entitled to priority of payment out of the assets in the hands of the Receiver,"

because it having been found as a fact that complainant succeeded to all the rights of the State of Georgia arising out of said deposit, complainant was therefore entitled to [fol. 24] priority of payment out of the assets in the hands of respondent because the lien on said assets to which respondent succeeded was not in anywise impaired or destroyed by the subsequent insolvency of said bank.

3

Because insofar as said decree places the rights of complainant on a parity with ordinary depositors, and deprives complainant of its lien rights arising out of the depositary bond and the statutes of Georgia creating a lien on the assets because of said bond, the said decree destroys the rights vested in the State of Georgia, to which complainant succeeded.

Wherefore, complainant prays that the judgment and decree of the District Court of the United States may be reversed.

Little, Powell, Reid & Goldstein, Solicitors for Complainant.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 5, 1933

To the Clerk of the District Court of the United States for the Middle District of Georgia:

You are requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers or exhibits, to-wit:

1. The original bill, omitting process and service.
2. The motion to dismiss of the defendants.

[fol. 25] 3. The order of the Court on the motion to dismiss dated July 7, 1933, together with the exception noted and allowed thereon.

4. The findings of fact and conclusions of law signed herein on July 31, 1933.

5. The final decree signed July 31, 1933.

6. The petition for appeal and order allowing same and fixing the bond all dated August 5, 1933.

7. The appeal bond.

8. The assignments of error.

9. This præcipe.

10. Citation to appellee and acknowledgment of service.

11. All entries of filing, together with acknowledgments of service wherever they appear, each in its proper place.

Little, Powell, Reid & Goldstein, Solicitors for Appellant.

Service of the foregoing præcipe acknowledged; copy received; further service waived. This August 5, 1933.

Miller & Lowrey, Solicitors for Appellee.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

RECITAL AS TO CITATION

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 3rd, 1933

On this day this cause was called, and, after argument by M. F. Goldstein, Esq., for appellant, and Jas. A. Lowrey, Jr., Esq., for appellee, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

Appeal from the District Court of the United States for the Middle District of Georgia

(December 7, 1933)

Before Bryan, Foster and Sibley, Circuit Judges

OPINION OF THE COURT—Filed December 7th, 1933

SIBLEY, Circuit Judge:

This appeal seeks to assert the validity of the Georgia statutory lien for deposits of State funds against the property of an insolvent national bank which was a State de-

pository. By a statute passed in 1876, now §218 of the Code of Georgia, it is provided as to the State Treasurer's bond: "And all the property of the Treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the Treasurer of the duties of his office from the date of the execution of the bond, and a lien is hereby created in favor of the State upon the property of the Treasurer to the amount of said bond, and upon the property of the securities upon his bond to the amount for which they may be severally liable from the date of the execution thereof." In 1879 another Act was passed, found in §§1249 et seq. of the Code, providing that the Governor might appoint solvent banks of good standing and credit to be depositories for State funds for terms of four years without salary, and by §1252 said depositories shall before entering on the discharge of their duties by their proper officers execute a bond with good and sufficient sureties to be fixed and approved by the Governor, "Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money and effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the Executive Office * * * and said bonds shall have the same binding effect as the bond required by law to be given by State Treasurers, and in case of default shall be enforced in like manner." The words last quoted mean that the depository's bond, like the Treasurer's, is a lien on the property of the principal and sureties from its date. Seay vs. Bank of Rome, 66 Ga. 609; Solquitt, Governor, vs. Simpson, 72 Ga. 501; Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159. These early cases also establish that the lien extends to all property, including money and choses in action when they are in a receiver's hands, and that everyone is bound to take notice of it. In the case of Colquitt, Governor, vs. Simpson, a surety on a bond dated Nov. 18, 1879, sold land on Jan. 10, 1881, to purchasers who claimed ignorance that he was such surety. On April 1st, 1881, a fi. fa. was issued by the Governor on the bond and levied on the land. The purchasers were held charged with notice and their land was held subject to the lien. The lien therefore exists be-

fore insolvency and before default of the depository, and adheres to realty aliened to others. As to choses in action it is held the lien does not prevent the exercise of the ordinary rights of setoff. State vs. Brobston, Receiver, 94 Ga. 95. The statutes have been so construed to this day. Standard Accident Ins. Co. vs. Luther Williams Bank & Trust Co., 45 Ga. App. 831. National banks are expressly made eligible to appointment by §1253; and by an Act passed in 1893, §1256, there is a provision requiring a national bank to give bond in double the sum to be deposited although the general requirement is only that bonds shall cover fully the amount to be deposited; and a provision that all the State depositories may make bond by a deposit with the State Treasurer of State or United States bonds instead of by a personal bond.

Under these statutes so construed the Governor on July 6, 1928, appointed the Hancock National Bank of Sparta, Georgia, a State depository to receive State taxes, expressly referring to the Act of 1879 and requiring a bond of $10,000.00. On July 12 the Board of Directors of the Bank accepted the appointment and directed that the bond be made. A personal bond with surety was executed accordingly, the bond making explicit reference to the Act of 1879, and being conditioned as the Act requires. On the failure of the Bank, May 23, 1932, it had on deposit of State's money $6,221.73, which on demand was paid to the State by the surety, Fidelity & Deposit Company of Maryland, the State assigning its claim against the Bank. Relying both on this assignment and on its right of subrogation the surety brought a bill to assert the statutory lien against the assets in the hands of the Bank's receiver. On motion the bill was dismissed as respects the lien, but a claim as general creditor was decreed. The surety appeals.

It is not denied that the surety has all the rights that the State had against the Bank's property. The contention is that the State can have no such lien as against a national bank, and particularly none after its insolvency, since its assets are required by 12 U. S. C. A. §194 to be paid ratably to all creditors. It will be noticed that the lien asserted is not one involuntarily imposed by the State law, but created by the contract of the managing authorities of the Bank. The Bank was not compelled to accept the appointment, nor, having accepted, to give a bond carrying the

statutory lien, but might have made a special pledge instead. It elected to make a bond under the statute and by a reference to the statute established contractually the lien as clearly as if it had been set forth by express words. The true operation of the statute is to sanction and make lawful so far as it could such a contract. The real question is whether by federal law the contract is forbidden to a national bank.

It is first objected that such a bank, which constitutionally exists only because it is a fiscal agency of the federal government, cannot thus agree to act for the State government, nor bind itself to perform "all such duties as are required of it by the General Assembly." No duties, however, have ever been required except to receive and account for the public moneys, which is a banking function, and none are suggested which are incompatible with duty to the United States or to the banking public. It has been held that a State depository is not a State officer but only an agency to keep the public funds. Colquitt, Governor, v. Simpson, 72 Ga. 502. For fifty years national banks have served as such, and no conflict of duties has appeared.

It is next objected that the lien on all property of the bank when a bond is given is beyond the bank's powers because it disables the bank from functioning in that it cannot dispose of its lands unless the purchaser will rely on its warranty of title, and that even the money paid out and the stocks, bonds and notes transferred from it in the course of business would be encumbered with a lien which would prevent their acceptance. This objection applies to State as well as national banks. It is forcibly stated by Judge Barrett In re Blalock, 31 Fed. (2d) 612, and it was there denied that the lien held good on money, notes and accounts transferred by the bank in due course of trade. We think that conclusion correct. The Legislature could not have intended to tie up the commercial assets of the banks which become depositories so that they could do no business. Liens on such ambulatory property are usually not effective until in some way it has been seized and sequestered, as by garnishment or by the appointment of a receiver therefor. In the early case of Miller vs. Race, 1 Burr. 452, 1 Smith's Leading Cases 516, the question arose whether one who takes a stolen bank note in due course of trade gets a good title contrary to the general rule that

no one can pass a better title than he himself has. Lord Mansfield held the title good and gave such reasons as these: "Upon the general course of business and from the consequences to trade and commerce which would be much incommoded by a contrary determination"; "on account of the currency of them"; "it is necessary for the purposes of commerce that their currency should be established and secured." On similar reasons it should be supposed that the money, notes, stocks and bonds which are the stock in trade of a bank were not intended to be deprived by the State's lien of their commercial usefulness. An analogy may be found in the Georgia mortgage upon a stock of merchandise the lien of which, though known to the customer, is released from goods sold in the due course of trade and attaches to others acquired in their place. So a Georgia judgment which is a general lien against the defendant's property from its date does not affect the transfer in good faith of money, corporate stocks or choses in action until they are seized by levy, garnishment or receivership. A mortgage of rents or income from property is not effective until proceedings are begun to sequester them. Taxes in Georgia are a general lien against all the property of the taxpayer from the accrual of the tax, so that in this State from the first of each year when the taxes are returned until the end of the year when they are paid, every item of property in the State is necessarily under a tax lien, but business is not stopped thereby. Certain it is that for fifty-three years the banks, both State and national, have acted as state depositories under this lien without any practical embarrassment. Indeed, it is common knowledge that they have advertised on their street-signs and letterheads that they are state depositories as an evidence of their soundness and credit. The State courts have asserted the lien against cash and choses in action when captured by a receivership (Seay vs. Bank of Rome, Standard Accident Ins. Co. vs. Luther Williams Bank, supra), but never have asserted it as to commercial assets transferred in due course of business.

This construction of the operation of the lien also answers the objection that a national bank would thereby be prevented from selling its stocks as required by 12 U. S. C. A. §82, or from pledging bonds or other securities to the United States for public deposits under §90, or from se-

curing their circulating notes under §101. As held In Re Blalock, supra, pledges and sales of choses in action in due course of business are freed from the lien.

The securing of public deposits we have held to be within the banking powers of a national bank. Potorff vs. El Paso-Hudspeth Road District, 62 Fed. (2d) 498. Deposits of money of the United States must be secured. 12 U. S. C. A. §90. In Cook National Bank vs. United States, 107 U. S. 445, it is said: "The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. . . . The Government can thus always have security limited in amount only by the judgment of the Secretary of the Treasury for public money deposited in any national bank." The bank, therefore, can not only give him its best securities but all it has. The creation by means of a bond of a lien against the entire assets of a State bank for a debt to the United States was upheld in United States vs. Robertson, 5 Pet. 641. That this was the effect of the decision is pointed out in the dissent at its conclusion; and this effect of the decision was again asserted in Planters Bank vs. Sharp, 6 How. at page 323. If the United States may have as security the bank's entire assets we see no reason why a State may not have a contract lien on them. The Comptroller of the Currency for fifty years has approved the receipt by national banks in Georgia of State deposits under this contract for a general lien on all property. With knowledge presumably of it the Congress on June 25, 1930, so amended 12 U. S. C. A. §90 as to provide: "Any association may upon the deposit with it of public money of a State or any political subdivision thereof give security for the safekeeping and prompt payment of the money so deposited of the same kind as authorized by the law of the State in which such association is located in the case of other banking institutions in the State." We regard this legislation as declaring and defining the power to secure such deposits rather than as creating it. It certainly does not prohibit the kind of security long authorized by the laws of Georgia, and given by the banks in Georgia. But after all a sufficient pledge of specific assets does the same harm to general creditors as if more assets or all had been pledged. In either case the secured creditor gets fully paid and general creditors get the remainder. A deposit of public funds in-

creases the assets of the bank by the amount of the deposit, and any sufficient method of security merely returns that increase according to agreement. We cannot say that the voluntary creation of a general lien provided by the Georgia statute is beyond the power of a national bank.

But it is urged that the lien can have no operation in case of insolvency because of 12 U. S. C. A. §91, prohibiting preferences made in view of insolvency, and §194 requiring the payment of ratable dividends to creditors. The statutes do not affect liens validly existing against the bank's property before receivership. They were considered in Scott vs. Armstrong, 146 U. S. 499, and on page 510 it is said. "Liens, equities or rights arising by express agreement or implied from the nature of the dealings between parties or by operation of law prior to insolvency and not in contemplation thereof are not invalidated"; and again in Earle vs. Pennsylvania, 178 U. S. 449, at page 454: "The right thus acquired by the service of the attachment was not lost by the suspension of the bank and the appointment of the receiver. The assets of the bank passed to the receiver burdened as to the interests that Long had in them with a lien in favor of the plaintiff in attachment which could not be disregarded or displaced by the Comptroller of the Currency." The lien here involved, as we have pointed out, arises by a voluntary contract and exists from the date of the bond of which it forms a part. In spite of its generality it is not a priority arising on the insolvency of the bank. Insolvency is nowhere mentioned in the statutes defining it. It is true that the lien seldom needs assertion unless insolvency occurs, but that is true of all security. The lien on all property of the signers of the bond may be compared to the tax lien on all property of the taxpayer. That such tax liens are true liens and not priorities on insolvency we held in enforcing them against assets in bankruptcy, In Re Brannon, 62 Fed. (2d) 959. The preference under state laws which was attempted to be enforced against bank assets in Davis vs. Elmira Bank, 161 U. S. 275, was a priority arising only on insolvency, indeed a part of the state statutes for administering an insolvent bank, and was in conflict with §194.

Finally attention has been called to the provision of the Act of 1893, Code §1256, requiring double bond of a national bank as a state depository. It is argued that this

difference was made because the Legislature knew the state could have no lien against national banks. We have been unable to find sufficient support for the proposition that the state can have no such lien, and none at all for that being the reason for the difference made. The reason may have been that the state has no power to examine national banks as it does state banks. The discrimination seems indeed not to be enforced, for this bank under a bond of $10,000.00 had a deposit of over $6,000.00 on May 23rd, and it may be judicially noticed that taxes in Georgia are due in December and collections are at their flood tide in January.

The sum of the matter is this: The state with an express reference to its statutes making the bond a general lien from its date offered to deliver money to the bank if the bank would give a $10,000.00 bond; the directors accepted the offer and the bank gave the bond, again referring to the statute, and received the money. We find no adequate reason why the lien established by the law and by the agreement was not good from the date of the bond, and is not enforceable against the bank's property of all kinds now in the receiver's hands. We reverse the dismissal of the bill as respects the lien, and remand the cause for further proceedings not inconsistent with this opinion.

Teste.

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia

JUDGMENT

Extract from the Minutes of December 7th, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the judgment of

the said District Court in this cause dismissing the bill as respects the lien be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, W. K. Howard, as Receiver of Hancock National Bank, of Sparta, Georgia, be condemned to pay the costs of this cause in this Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

vs.

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

Petition for Stay of Mandate

MOTION AND ORDER STAYING MANDATE—Filed December 27th, 1933

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit and the Honorable Judges thereof:

Comes now W. K. Howard in his official capacity as Receiver of Hancock National Bank and shows that on December 7, 1933, this Honorable Court rendered an opinion in the above stated case adverse to appellee, reversing the judgment of the United States District Court for the Middle District of Georgia, wherein that court dismissed the petition of Fidelity & Deposit Company of Maryland insofar as it sought to establish a lien on the assets of the Hancock National Bank by reason of Sects. 1252 and 218 of the Code of Georgia; and this court in its opinion directed that the cause be remanded for further proceedings not inconsistent with said opinion.

Said Receiver, appellee above named, has been authorized and directed by the Comptroller of the Currency to apply

to the United States Supreme Court for a certiorari to have said case certified to the Supreme Court, and has been directed by the Comptroller of the Currency to apply for a stay of the mandate of this court in the above stated case.

Said Receiver intends to apply for said certiorari within the next sixty days.

Wherefore said Receiver prays that the mandate of this court be stayed for a period of sixty days as provided in Sect. 350 U. S. C. A., Title 28, and that he be relieved of giving any bond for damages and costs as provided in Sect. 870 U. S. C. A., Title 28.

(Signed) Sam H. Wiley, Jas. A. Lowrey, Wallace Miller, Attorneys for Appellee.

GEORGIA,
Bibb County:

I, Wallace Miller, do solemnly swear that I am one of counsel for W. K. Howard, appellee herein, and that the said W. K. Howard was instructed and directed by the Comptroller of the Currency of the United States by long distance on this date, to-wit, December 26, 1933, to apply for a stay of the mandate of this court in the above stated case, and to petition the Supreme Court of the United States for its writ of certiorari directed to this court requiring that said case be certified to the Supreme Court of the United States for determination by it.

This affidavit is made by me as counsel for the reason that an affidavit from W. K. Howard cannot be obtained within the time required by the rule of this court for obtaining a stay of mandate in this case.

(Signed) Wallace Miller.

Sworn to and subscribed before me, this 26th day of Dec., 1933. (Signed) Margaret Haverfield, Notary Public, State of Georgia at Large. (Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of December, 1933.

(Signed) Rufus E. Foster, United States Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

versus

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for an additional period of thirty days from January 26, 1934, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from said date there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from January 26, 1934, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 23rd day of January, 1934.

(Signed) Rufus E. Foster, United States Circuit Judge.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify

that the pages numbered from 27 to 42 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 7104, wherein Fidelity & Deposit Co. of Maryland, is appellant, and W. K. Howard, as Receiver of Hancock National Bank, of Sparta, Georgia, is appellee, as full, true and complete as the original of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 26 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 27th day of December, A. D. 1933.

Oakley F. Dodd, clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals for the Fifth Circuit.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND, Appellant,

vs.

W. K. HOWARD, as Receiver of Hancock National Bank of Sparta, Georgia, Appellee

Motion for Substitution of Party Appellee

MOTION TO SUBSTITUTE JOHN C. LEWIS, AS RECEIVER, ETC., IN PLACE OF W. K. HOWARD, DECEASED—Filed February 9th, 1934

Comes now John C. Lewis, in his capacity as Receiver of the Hancock National Bank of Sparta, Georgia, and successor to the late W. K. Howard, deceased, as Receiver of said bank, and shows to the Court:

1

W. K. Howard died on January 19, 1934, and up to the time of his death was Receiver of the Hancock National Bank of Sparta, Georgia, and as said Receiver the appellee in the above stated case.

2

On January 23rd, 1934, your movant, John C. Lewis, was duly appointed Receiver of said Hancock National Bank and successor to the said W. K. Howard as Receiver of said bank, and has duly qualified as said Receiver, and is now the successor in office of the said W. K. Howard as said Receiver.

3

Movant shows that he desires to perfect and file with the Supreme Court of the United States a petition for certiorari, and it is necessary that he be made, in his official capacity as said Receiver, the party appellee in the above stated case, to the end that he may apply for a writ of certiorari to the Supreme Court of the United States to have that Court review and adjudicate the questions involved in the above stated case.

4

Movant shows further that in the event the Supreme Court does not reverse the judgment of this Court it will be necessary that movant, in his capacity as said Receiver, be a party to said suit in order that proper judgment may be entered in the trial court.

5

Movant shows that the above stated case relates to the discharge of the official duties of the Receiver of the Hancock National Bank.

Wherefore, Movant prays that he, as Receiver of the Hancock National Bank of Sparta, Georgia, be substituted for the said W. K. Howard as said Receiver in said suit, and that this Court permit said cause to be continued and maintained against him as successor in office to the said W. K. Howard, deceased.

(Signed) Sam H. Wiley, Jas. A. Lowrey, Jr., Wallace Miller, Attorneys for Movant.

GEORGIA,
Hancock County:

In person appeared before the undersigned officer, authorized to administer oaths, John C. Lewis, who, being first sworn, deposes and says that the allegations of fact set forth in the foregoing motion are true, and that he is now the duly qualified and acting Receiver of the Hancock National Bank and successor in said office of the late W. K. Howard, deceased.

(Signed) John C. Lewis.

Sworn to and subscribed before me, this 7 day of February, 1934. (Signed) Mrs. T. L. Reese, Ordinary Hancock County, Georgia. (Seal.)

Due and legal notice of the foregoing application of John C. Lewis, as Receiver of the Hancock National Bank, to be substituted for W. K. Howard as Receiver of said bank in the above stated cause is acknowledged; and the Fidelity & Deposit Company of Maryland, appellant in said cause, hereby consents to said substitution.

This February —, 1934.

(Signed) Max F. Goldstein, Little, Powell, Reid & Goldstein, Attorneys for Fidelity & Deposit Company of Maryland.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7104

FIDELITY & DEPOSIT CO. OF MARYLAND

versus

W. K. HOWARD, as Receiver of Hancock National Bank in Sparta, Georgia

ORDER SUBSTITUTING JOHN C. LEWIS, AS RECEIVER, ETC., IN PLACE OF W. K. HOWARD, DECEASED

Extract from the Minutes of February 9th, 1934

It appearing from the verified motion of John C. Lewis that W. K. Howard died January 19, 1934, and that the

said John C. Lewis has succeeded him as Receiver of the Hancock National Bank, of Sparta, Georgia, and the Fidelity & Deposit Company of Maryland having consented that said John C. Lewis, as Receiver of the Hancock National Bank, be substituted for W. K. Howard, as Receiver of said bank, as a party in the above stated case;

It is ordered that the said John C. Lewis, as Receiver of the Hancock National Bank of Sparta, Georgia, be, and he is hereby, substituted as a party for the said W. K. Howard, as Receiver of said bank in said cause, and the case continued and maintained with the said John C. Lewis, as Receiver of the Hancock National Bank, substituted for the said W. K. Howard, as said Receiver.

Oakley F. Dodd, Clerk; U. S. Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

Clerks Office. Attest. A true copy.

New Orleans, La., February 9th, 1934.

(4611-c)

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter J. F. Anderson. File No. 38,405. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 802. John C. Lewis, as Receiver of the Hancock National Bank of Sparta, Georgia, petitioner, vs. Fidelity & Deposit Company of Maryland. Petition for a writ of certiorari and exhibit thereto. Filed February 19, 1934. File No. 802, O. T., 1933.

FILE COPY

FILED
FEB 19 1934
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 802.

JOHN C. LEWIS, as Receiver of the Hancock National Bank of Sparta, Georgia, *Petitioner,*

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

SAMUEL H. WILEY,
WALLACE MILLER,
JAS. A. LOWREY, JR.,
JOHN F. ANDERSON,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
PETITION FOR CERTIORARI	1
Caption	1
Prayer for Writ of Certiorari	1
The Case	2
Questions Presented	4
Assignments of Error	5
Reasons for Granting Certiorari	6
Verification	9
BRIEF IN SUPPORT OF PETITION	10
Reference to Opinion of Lower Court	10
Jurisdiction	10
Statement of the Case	10
Assignments of Error	12
Summary of Argument	12
Argument	13
Lien Invalid Under Any Construction	13
Lien Invalid as Construed by U. S. Circuit Court of Appeals	14
Lien Invalid as Construed by Georgia Supreme Court	19
Lien is Ultra Vires	21
No Lien Attaches to the Bond Required of a National Bank	23
Why Writ Should Issue	25
Appendix	27

TABLE OF CASES CITED

	Page
Burton vs. Smith, 13 Peters 464	18
Collins vs. New Hampshire, 171 U. S. 30	15
Cook County Nat. Bank vs. U. S. 107 U. S. 445	7, 15, 21
Davis vs. Elmira Savings Bank, 161 U. S. 275	7, 14, 16, 20
Farmers & Mechanics Natl. Bank vs. Dearing, 91 U. S. 29	8, 21
Easton vs. Iowa, 188 U. S. 220	8, 21
First Nat. Bank of San Jose vs. California, 262 U. S. 366, 67 L. ed. 1030	20
Logan County Nat'l Bank vs. Townsend, 139 U. S. 67	8, 21
Mathis vs. Morgan, 72 Ga. 517	19
Planters Bank vs. Sharp, 6 Howard 301, 323	22
Seay vs. Bank of Rome, 66 Ga. 609	17
Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159	17
State vs. Brobston, 94 Ga. 95	18
U. S. vs. Robertson, 5 Peters 641	22

TABLE OF STATUTES CITED.

Code of Georgia — Page

Sect. 218, cited 3, 11, 12, 16
Quoted in full in Appendix 27
Sect. 1252, cited 2, 5, 11, 12, 16, 24
Quoted in full in Appendix 27
Sect. 1254, cited 25
Quoted in full in Appendix 28
Sect. 1256, cited 5, 24
Quoted in full in Appendix 28
Sect. 3256, cited 18
Quoted in full in Appendix 29
Sect. 5948, cited 18
Quoted in full in Appendix 29

National Banking Act, Title 12, U. S. C. A.

Sect. 29, cited 19
Quoted in full in Appendix 29
Sect. 60, cited 19
Quoted in full in Appendix 29
Sect. 83, cited 19
Quoted in full in Appendix 30
Sect. 90, cited 19
Quoted in part in Appendix 30
Sect. 91, cited 13, 14, 15, 19
Quoted in full in Appendix 30
Sect. 101, cited 19
Quoted in part in Appendix 31
Sect. 121, cited 20
Quoted in part in Appendix 31
Sect. 194, cited 13, 14, 15
Quoted in full in Appendix 31

Judicial Code Sect. 240 (a); 28 U. S. C. A., Sect. 347 .. 10

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 802.

JOHN C. LEWIS, as Receiver of the Hancock National Bank of Sparta, Georgia, *Petitioner,*

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

To the Honorable the Supreme Court of the United States:

Your Petitioner, John C. Lewis, as Receiver of the Hancock National Bank and successor in said trust to W. K. Howard, deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of Fidelity & Deposit Company of Maryland, appellant, vs. W. K. Howard, as Receiver of Hancock National Bank of Sparta, Georgia, appellee, on December 7, 1933, 67 Fed. (2d) 961) reversing the judgment of the United States District Court for the Middle District of Georgia.

I.

THE CASE.

The Fidelity & Deposit Company of Maryland, as subrogee and assignee of the rights of the State of Georgia, under a State depository bond executed July 12, 1928, by the Hancock National Bank of Sparta, Georgia, as principal, and the Fidelity & Deposit Company of Maryland, as surety, to the Governor of Georgia, filed suit in the Superior Court of Hancock County, Georgia, against W. K. Howard, in his capacity as Receiver of said national bank, seeking to establish a lien, ranking in priority from the date of execution of said bond, on all the property of said bank and the proceeds of all assets coming into the control of said Receiver, to the amount of the State's deposit in the bank at the time of the Receiver's appointment. This suit was removed to the United States Court.

Plaintiff in said suit based its claim of lien on Sects. 1252 and 218 of the Code of Georgia, the material parts of which are as follows:

> "Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. * * * and said bonds shall have the same binding force and effect as the bond required by law to be given by State treasurers, and in case of default, shall be enforced in like manner. * * *
>
> Sect. 1252, Park's Ann. Code of Ga.
>
> * * * all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the trea-

surer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof."

Sect. 218, Park's Ann. Code of Ga.

The Receiver filed his motion to dismiss plaintiff's petition, asserting: (1) The lien sought to be established is invalid; (2) there is no equity in the petition; (3) the execution of the bond was beyond the charter power of a national bank, without authority of law and contrary to public policy; (4) the execution of said bond did not create a valid lien in favor of the State on the assets of said bank.

The trial court sustained the motion and entered a judgment dismissing the petition in so far as it sought to establish a lien upon the properties of the bank in the hands of said Receiver, but retained the petition for the sole purpose of allowing plaintiff to establish its claim as a general creditor.

A stipulation by the Receiver in open court admitted all allegations of the petition except the claim of lien; whereupon, the District Court entered its final decree denying the lien contended for and allowing plaintiff's claim in the amount of $6,206 as a general creditor.

From this final decree plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals reversed the judgment of the District Court on December 7, 1933.

While said case was pending in the Circuit Court of Appeals on a stay of mandate, W. K. Howard died, and your petitioner was substituted for the said Howard as a party in said case in the Circuit Court of Appeals.

II.

QUESTIONS PRESENTED.

(1) Whether the statutes of Georgia, codified as Sects. 1252 and 218 of the Code of Georgia, declaring a lien on all the property of a bank appointed a State depository, upon its giving a depository bond, to the amount of the bond and from the date of the bond, is valid and enforceable as to national banks qualifying as State depositories.

(2) Whether a national bank has the power to give a lien on all of its property of every kind and character, including property subsequently acquired, to secure deposit of State funds, by giving a depository bond to which State statutes attach such a lien.

(3) Whether a national bank has the power to give a bond to a state conditioned for the faithful performance of all such duties as shall be imposed on it by the General Assembly and the laws of the state.

(4) Whether the statutes of Georgia declaring a lien on all the properties of a depository bank are properly construed as providing a lien from the execution of the depository bond, effective as to land, which does not, however, attach to assets such as notes, accounts, stocks and other commercial assets, until a receiver is appointed for such bank on its insolvency.

(5) If the lien to be given the State under these statutes, on all the property of a depository bank, is only effective as to commercial assets on the appointment of a receiver, are not these statutes in conflict with the provisions of the National Banking Act as set forth in Sects. 194 and 91, Title 12, U. S. C. A., when applied to a national bank for which a receiver has been appointed?

(6) If the statutes of Georgia declaring a lien on all the properties of a depository bank are properly construed as creating a lien, effective from the date of the bond, on all the property of the bank of every kind and character, would not such a lien impair the functions of a national bank as

an agency and instrumentality of the National Government, and render invalid the Georgia statutes when applied to a national bank?

(7) Sect. 1256 of the Georgia Code requires a national bank in qualifying as a State depository to give a depository bond, to give a bond in double the amount of the deposit. Sect. 1252, which provides for the lien from the date of execution of the depository bond, requires a bond only equal to the amount of the deposit.

Does not the requirement of Sect. 1256, calling for bond twice the amount of the deposit, render inapplicable to national banks the lien provision of Sect. 1252, requiring bond only equal to the deposit?

III.

ASSIGNMENTS OF ERROR.

(1) The Circuit Court of Appeals erred in deciding in substance and effect that the statutes of Georgia declaring a lien on all the property of a depository bank from the date of the depository bond are valid as applied to a national bank qualifying as a State depository.

(2) The Circuit Court of Appeals erred in deciding that a national bank has power to give a general lien on all of the property of the bank to secure a deposit of State funds.

(3) The Circuit Court of Appeals erred in deciding that the lien prescribed by the statutes of Georgia in the case of a depository bank is enforceable against the bank's property of all kinds in the Receiver's hands.

(4) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 of the Georgia Code as authorizing a national bank as a State depository to give a general lien on all the property of the bank to secure deposits of State funds.

(5) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 so as to create a lien on all assets of a national bank in Georgia—a lien existing from the time

of the execution of the depository bond, but sleeping and innocuous until insolvency, when it becomes awakened and effective, attaching to all assets of every character in the hands of the receiver.

IV.

REASONS FOR GRANTING CERTIORARI.

(1) The questions presented in this petition are of great general importance because vitally affecting the business of national banks and the distribution of the funds of insolvent national banks.

Under the decision of the Circuit Court of Appeals a state can, by statute, declare a lien on all property of a National bank receiving state funds on deposit, which will be inoperative as to commercial assets while the bank is a going concern, but which will become effective only on the appointment of a receiver, and thereby give to the state a preference, providing the statute is so drafted as to declare a lien from the date of the execution of the depository bond. Such a lien, the Circuit Court of Appeals says, will not impair the functions of a national bank as an instrumentality of the Government because declared to be analogous to the Georgia statutory chattel mortgage on a stock of merchandise, changing in specifics, so long as the bank is a going concern, and that such a lien will not conflict with the provisions of the National Banking Act prohibiting preferences, because the statute provides that the lien comes into life on the execution of the depository bond.

(2) The Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: The power of a national bank to give a lien on all of its property of every kind and character, and the validity of such a lien declared by a state statute as applied to a national bank.

This question should be settled by this Court because it vitally affects the powers of a national bank, and the pow-

ers and duties of the Comptroller of the Currency in the supervision of national banks and the administration of its assets on insolvency, and also vitally affects the rights of all persons dealing with a national bank which may be a state depository.

(3) The decision handcuffs the Comptroller of the Currency in the ratable and equitable distribution, among its creditors, of the assets of an insolvent national bank in Georgia, and in all other states having or hereafter enacting similar statutes, and will involve the receivers of insolvent national banks in numerous suits to determine the effect of such statutes and how they shall make distribution of the assets of insolvent national banks, as directed by the National Banking Act and as limited by state statutes.

(4) The Circuit Court of Appeals has decided a Federal question in conflict with the decision of this Court in the case of Davis vs. Elmira Bank, 161 U. S. 275, in that the Circuit Court of Appeals decided that a lien arises upon all the property of a national bank upon its giving a Georgia depository bond, which is ineffective as to commercial assets until the appointment of a receiver, but is valid and enforceable against all assets in the hands of such receiver. In the case of Davis vs. Elmira Bank, 161 U. S. 275, this Court denied the validity of a state statute creating a lien arising on insolvency of a national bank. The Georgia statute, as construed by the Circuit Court of Appeals, and in its operation and effect, is in conflict with the provisions of the National Banking Act set forth in 12 U. S. C. A., Sects. 194 and 91.

(5) The decision of the Circuit Court of Appeals conflicts with the decision of this court in the case of Cook County National Bank vs. U. S., 107 U. S. 445, wherein this Court considered the National Banking Act as constituting a complete system for the establishment and government of national banks and providing everything essential to the winding up and distribution of their effects, neither limited

nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents. Likewise, said decision is in conflict with the decisions of this Court in the cases of Farmers & Mechanics National Bank vs. Dearing, 91 U. S. 29; Logan County National Bank vs. Townsend, 139 U. S. 67; Easton vs. Iowa, 188 U. S. 220, establishing that Federal statutes relative to national banks alone constitute the measure of authority of such banks, and they cannot exercise any powers except those expressly granted or incidental to carrying on the business for which they are created.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted and its judgment reversed.

SAMUEL H. WILEY,
WALLACE MILLER,
JAS. A. LOWREY, JR.,
JOHN F. ANDERSON,
Attorneys for Petitioner.

United States of America,
Middle District of Georgia.

Personally appeared John C. Lewis, who, being duly sworn, deposes and says that he is Receiver of the Hancock National Bank, an insolvent national bank of Sparta, Hancock County, Georgia, duly qualified and appointed and authorized to make this affidavit; that he has read the foregoing petition for certiorari, and that the facts stated therein are true; and that said application for certiorari is not made for the purpose of delay, but that he is advised and believes that he has meritorious reasons why he should apply for a writ of certiorari to be granted in the within stated case.

JOHN C. LEWIS.

Sworn to and subscribed before me, this 12th day of February, 1934.

MARVIN G. ROUND,
Notary Public,
State of Georgia at Large,
Sparta, Ga.

(Seal)

My Commission Expires Feb. 12, 1936.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The trial court filed no opinion in this case, but its findings of fact and conclusions of law are set forth in the Record, pages 15 to 19, inclusive. The opinion of the Circuit Court of Appeals is reported in 67 Fed. (2d) 961.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code Sect. 240 (a), as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sect. 347. The judgment of the Circuit Court of Appeals to be reviewed was entered December 7, 1933 (R. 27).

III.

STATEMENT OF THE CASE.

The nature of the case has been stated in the petition. However, it may be helpful to give the material facts out of which the case arises.

On July 6, 1928, the Governor of Georgia appointed Hancock National Bank of Sparta, Georgia, a State depository, for the term of four years, in which monies collected for State taxes should be deposited; and required the bank to give a fidelity bond in the sum of $10,000 (R. 7 & 8).

On July 12, 1928, the board of directors of Hancock National Bank, to make effective the appointment of said bank as a State depository, authorized its president to execute a bond in the sum of $10,000 (R. 10). On the same date the bank, as principal, and the Fidelity and Deposit Company of Maryland, as surety, executed a bond to the Governor of Georgia, and his successors in office, in the

sum of $10,000, (reciting the appointment as a State depository and its acceptance) conditioned for the faithful performance of all duties as should be required of the bank by the General Assembly or laws of Georgia, and to account for all public money or effects that might come into its hands during its continuance in office (R. 8 & 9).

Thereafter, on July 31, 1928, the Governor issued an order that the Tax Collector of Hancock County pay over to said bank all monies collected by him on account of State taxes, except such as might be paid directly into the State treasury (R. 10 & 11).

The Hancock National Bank became insolvent, and on May 23, 1932, the Comptroller of the Currency appointed W. K. Howard receiver of said bank. On the date of the appointment of the Receiver the deposit of State tax funds amounted to $6,157.41 (R. 3 & 4).

On July 28, 1932, the Fidelity & Deposit Company of Maryland paid to the State the amount of its deposit in the closed bank with interest, and took an assignment of the right and interest of the State, together with any preferences or liens it might have on account of the funds deposited with the Hancock National Bank (R. 4 & 11).

Upon refusal of the Receiver to recognize any lien or preference claimed by the surety on account of said deposit, the surety filed its bill in equity to establish a lien on all of the bank's assets and proceeds of assets that came into the hands of the Receiver, basing its claim to such a lien on Sects. 1252 and 218 of the Code of Georgia, as construed and applied by the Supreme Court of Georgia (See Paragraph 10 of respondent's bill, R. 4).

The Georgia Code sections cited are set forth in full in the appendix.

On written motion of the Receiver (R. 13) the trial court dismissed the surety's bill insofar as it sought to establish a lien on the assets of the bank coming into the hands of the Receiver (R. 14), and on appeal the Circuit Court of Ap-

peals reversed the judgment of the District Court (R. 27) and decided that the surety is entitled to the lien it seeks on all of the bank's assets in the hands of the Receiver (R. 34).

W. K. Howard died on January 19, 1934, and his successor, John C. Lewis, was, by order of the Circuit Court of Appeals, substituted as a party herein.

IV.

ASSIGNMENTS OF ERROR.

(1) The Circuit Court of Appeals erred in deciding in substance and effect that the statutes of Georgia declaring a lien on all the property of a State depository bank from the date of the depository bond are valid as applied to a national bank qualifying as a State depository.

(2) The Circuit Court of Appeals erred in deciding that a national bank has power to give a general lien on all of the property of the bank to secure a deposit of State funds.

(3) The Circuit Court of Appeals erred in deciding that the lien prescribed by the statutes of Georgia in the case of a depository bank is enforceable against the bank's property of all kinds in the Receiver's hands.

(4) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 so as to create a valid lien on all assets of a national bank in Georgia—a lien existing from the time of the execution of the depository bond, but sleeping and innocuous until insolvency, when it becomes awakened, and attaching to all assets of every character in the hands of the receiver, destructive of the rights of common creditors.

V.

SUMMARY OF ARGUMENT.

(1) A lien in favor of the State, declared by the statutes of Georgia to arise upon the execution of the State depository bond, is invalid and void as applied to a national bank,

whether it be construed as arising on the date of the bond but ineffective until a receiver is appointed, or construed as arising on the date of the bond and binding all the property of the bank from that date.

(2) The lien as construed by the United States Circuit Court of Appeals is nothing more than a preference or priority, and violates Sects. 194 and 91 of Title 12, U. S. C. A., prohibiting preferences and providing for ratable distribution on insolvency.

(3) The lien as construed by the Supreme Court of Georgia binds and affects all the property of the bank from the date of the bond, and as so construed is invalid and void as applied to a national bank, because it impairs the functions of the bank as an agency and instrumentality of the National Government.

(4) State statutes can neither extend nor limit the powers of a national bank, and it is beyond the powers of a national bank, as measured by the Federal statutes, to give the lien as construed by the United States Circuit Court of Appeals, or the lien as construed by the Supreme Court of Georgia.

(5) When a national bank is designated a State depository and it gives a bond to secure State deposits, no lien whatever is intended or arises, as the bond required of a national bank is different from the bond required of a state bank.

VI.

ARGUMENT.

1.

Lien Invalid Under Any Construction.

The Circuit Court of Appeals takes the view that since the national bank was not required to accept the appointment as a State depository nor give a personal bond, its making bond, referring to its appointment under the statute, establishes contractually the statutory lien.

Neither the appointment nor the bond expressly provide that the State shall have a lien. Whether the lien is considered as arising contractually, on the theory the State statute is written into the bond, or as created by the State statute, the questions presented are the same, to-wit: The validity of the statute as applied to national banks and the power of national banks to give the statutory lien. Relevant provisions of the National Banking Act must be written into the bond contract as well as state statutes. (Davis vs. Elmira Savings Bank, 161 U. S. 276, 287).

It is our view that the lien declared by the State statute is equally invalid and ineffective as to the receiver of an insolvent national bank, whether it is construed as intended to be effective and operative only on the appointment of a receiver, or as intended to bind and affect the property of the bank from the date of the bond.

If the first construction be the correct one, then the so-called lien loses its character as a lien and becomes a priority, and so conflicts with the provisions of the National Banking Act prohibiting preferences and providing for ratable distribution among creditors, 12 U. S. C. A. Sects. 194 and 91 (See appendix). If the second construction be correct, as contended by the surety, then the lien binds all the property of the bank from the date of the bond to the amount of the bond, and is a lien beyond the power of a national bank to give, and beyond the power of a state legislature to authorize, as such a lien will necessarily impair the functions and efficiency of a national bank, an agency and instrumentality of the Federal Government.

2.

Lien Invalid as Construed by U. S. Circuit Court of Appeals.

It is the Circuit Court of Appeals' construction that the lien is not intended to affect the commercial assets while the bank is a going concern, but as to such assets becomes effective on the appointment of a receiver.

Assuming, without conceding, that this is a correct construction of the State statute, it means the State has no security in the case of a national bank until insolvency as far as the bank's commercial assets are concerned; that is, such assets as money, notes, accounts, securities, choses in action and the like, which constitute the bulk of the valuable assets of a national bank. In short, the effect of the statute, as so construed, is to give the State a preference or priority on insolvency.

In the case of Collins vs. New Hampshire, 171 U. S. 30, on page 34, this Court said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The lien having the effect of giving the State a preference on insolvency and preventing ratable distribution, it necessarily conflicts with Sects. 194 and 91, U. S. C. A., Title 12.

Referring to Sect. 194 U. S. C. A., Title 12, this Court, in the case of Cook County National Bank vs. U. S., 107 U. S. 445, 450, pointed out:

> "This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming notes."

If the assets to be distributed are assets belonging to the bank, under Sect. 194 they must be distributed ratably; and for any claimant to receive more than a ratable distribution, he must show a title in the property to be distributed, either legal or equitable, in which case it is not a distribution of the assets of the bank, but a return to the claimant of something that is his. Unless the Georgia statutory lien is such as gives to the State a present existing and continuing interest or title in the property of the bank from the date of the bond, it has nothing to be re-

turned to it, and the National Banking Act, the paramount law, prohibits any distribution to it or its assignee other than a ratable distribution.

The State lien on the commercial assets of a bank, as construed by the Circuit Court of Appeals, takes hold of nothing, but lies sleeping upon the threshold of insolvency, with monstrous but sensitive fingers, ready to arouse and seize all the bank owns the moment the receiver enters that threshold. But we submit that moment is too late in the case of a national bank, because the receiver enters under the protection of the National law, which stays the grasping hand of the then awakening lien (12 U. S. C. A. 192).

Pertinent here is the language of this Court in the case of Davis vs. Elmira Savings Bank, as follows:

> "Nor is the repugnancy between the state statute and the act of Congress removed by the contention that inasmuch as ratable distribution applies only to that which belongs to the bank, therefore there is no conflict between the state statute and the act of Congress. This argument can only mean that the effect of the state statute is to make the Savings Bank, in the event of insolvency of the National Bank, the owner of a sum equivalent in amount to the sum of money which was by it deposited. But to say this aggravates the conflict between the state law and the act of Congress. If the state statute is to be read as saying that whenever the persons named therein deposit money with a national bank they shall be treated as the owner of an equal sum of the assets of the bank when it becomes insolvent, then the state statute precludes, in a most flagrant way, the possibility of the ratable distribution ordered by the act of Congress."
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> Davis vs. Elmira Savings Bank, 161 U. S. 275, 288.

The construction placed by the Circuit Court of Appeals on Sects. 1252 and 218 of the Code of Georgia, creating a lien on the property of a depository bank, is in conflict with the construction given those sections by the Supreme Court of Georgia. While it is true that the State courts were

called upon to construe the sections in cases arising after the insolvency of *state* banks, there is nothing in the decisions of the State courts to indicate that a distinction is made between real estate and other assets, nor is there anything to indicate that the lien is not effective as to commercial assets while the bank is a going concern.

We point out with particularity the following language in the State court decisions:

> "Plaintiffs in error contend that the state has no lien on the notes, accounts and choses in action of said bank, because under our law a judgment fixes no lien on such property, and no levy and sale thereof can be had at law. The reply is, that upon the execution of the bond, the law gave the state a lien upon all the property of the bank; not upon such property only as a judgment would fix a lien upon; not upon such property only as is subject to levy and sale; but upon all the property of the bank. Are not notes and accounts property? Can any reason be given why it is not competent for the legislature to give a lien upon notes and accounts, as well as upon any other property?"

Seay et al. vs. Bank of Rome et al., 66 Ga. 609, 614.

> "We think they were bound to know of the existence of this lien: the law created the lien and expressly provided that it should exist, from the time of the execution of the bond, upon all the property of the principal and sureties; and everybody must take notice of this; the law gives them this notice."

Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159, 161.

> "To the granting of this order the State excepted. Were the notes in question assets of the bank upon which the State's lien takes effect, without reference to the liability of the bank to the makers of these notes for amounts justly due them, respectively, on their deposits? We think not. On the contrary, in our opinion, these notes were assets only in so far as there might be due to the bank balances upon them after de-

ducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was engaged in the transaction of its regular business and had control of its books."

State vs. Brobston, Receiver, 94 Ga. 95, 97.

The Circuit Court analogizes the depository lien to a Georgia chattel mortgage on a stock of merchandise; but it will be noted that the law of this State in regard to such chattel mortgage expressly provides:

"in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place." (Georgia Code of 1910, Sect. 3256. See appendix.)

As to a chattel mortgage on a stock of goods, when the Legislature intended that the lien should be lost on the goods disposed of and should attach to those acquired, it expressly said so. We see nothing in the State depository law which authorizes the court to write into it a provision which the Legislature has seen fit to leave out.

The same criticism may be made of the lower court's analogy to a judgment lien, the Code of Georgia expressly relieving choses in action from the lien of and seizure under a judgment (Code of Georgia, Sect. 5948. See appendix).

Furthermore, the lower court's construction that the lien does not apply to commercial assets while the bank is a going concern, means the State has no lien as to such assets while it is solvent and doing business. The following language of this Court is apposite here:

"We have already said that the judgment created a lien, now it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere; if this were not the case, it would cease to be a lien."

Burton vs. Smith, 13 Peters 464, 483.

Certainly the State can acquire no lien after insolvency.

3.

Lien Invalid as Construed by Georgia Supreme Court.

The statutes here under consideration, as construed by the State courts, create a lien on every conceivable asset of the bank from the date of the bond. There is no separation, no half-way ground, no specific property can be said to be affected while other assets escape. What then is the necessary effect of such statutes on the function of a national bank? The bank cannot sell the property it is authorized to acquire and required to dispose of under Title 12 U. S. C. A. Section 29, for no one would take it subject to a lien to the amount of the bond. Even the dividends the bank may declare under 12 U. S. C. A. Sect. 60, will be subject to the lien. How shall a national bank dispose of stock it acquires under 12 U. S. C. A. Sect. 83, which it is required to sell within six months from the date of purchase, if there is a lien attached to it? The very bonds a national bank is required to deposit with the Treasurer of the United States, under 12 U. S. C. A. Sect. 90, would be subject to the lien of the State if the lien declared by state law is effective, thereby destroying the function of the national bank as a depository of public money of the United States and a financial agent of the Government. Is it possible to conceive a lien being required on every asset of a bank except in contemplation of insolvency and to prevent the application of the bank's assets pro rata to its creditors? In fact the Supreme Court of Georgia, in the case of Mathis vs. Morgan, 72 Ga. 517, on page 522, said in effect that the bond was required "in apprehension that the Governor might make a mistake in its (the bank's) solvency."

Does not such a lien clearly offend against 12 U. S. C. A. Sect. 91? How can a national bank procure an issue of circulating notes after the lien of the State attaches to the bonds it must deposit with the Treasurer of the United States as provided in 12 U. S. C. A. Sect. 101? Is it think-

able that the Treasurer of the United States must accept bonds subject to a lien to secure deposits of the United States? How can the bank maintain a reserve or collateral with the Federal Reserve or other banks to procure necessary money from time to time to carry on its banking business, if its money and collateral are subject to a lien of the State? Is it conceivable that the money deposited by a national bank under Sect. 121 of Title 12 U. S. C. A., to be used for the redemption of its circulating notes, shall be subject to a lien of the State? (The relevant part of sections of the National Banking Act cited above are quoted in the appendix.)

A consideration of the foregoing questions makes it clear that a state statute creating a lien from the date of the bond is in conflict with many provisions of the National Banking Act and violative of its spirit and purpose, and, as applied to a national bank, is void.

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they are created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."
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> Davis vs. Elmira Savings Bank, 161 U. S. 275, 283.
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> See also:
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> First Nat. Bank of San Jose vs. California, 262 U. S. 366.

4.

Lien is Ultra Vires.

It is established by the repeated decisions of this Court that the National Banking Act constitutes a complete system for the establishment and government of national banks, and provides everything essential to the winding up and distribution of their effects, neither limited nor enlarged by other statutory provisions, state or Federal, with respect to the settlement of demands against insolvent banks; and that Federal statutes alone constitute the measure of authority of such banks; and they cannot exercise any powers except those expressly granted and such as are necessary for the purpose of carrying into effect the powers expressly granted.

See:

Cook County Natl. Bank vs. U. S., 107 U. S. 445.
Farmers & Mechanics Natl. Bank vs. Dearing, 91 U. S. 29.
Logan Natl. Bank vs. Townsend, 139 U. S. 67.
Easton vs. Iowa, 188 U. S. 220.

There is no provision in the National Banking Act giving a national bank the express power to give a lien on all of its assets of every kind and character to secure a deposit of state funds, whether such a lien be construed as effective from the date of the bond or as effective only upon the appointment of a receiver for the bank. We do not see how it is possible to determine that the power to give such a lien is necessary to the business of banking. To the contrary, as we have heretofore pointed out, such a lien would conflict with and offend against many provisions of the National Banking Act.

Looking to the entire National Banking Act, we assert with confidence that the lien contended for, whether it be the lien as construed by the United States Circuit Court of Appeals, or the lien as construed by the Georgia Su-

preme Court, is beyond the power of a national bank to give. If the bond given by the Hancock National Bank carried with it such a lien, then the bond to that extent was ultra vires and void. If the lien be considered as binding on all the assets of the bank from the date of the bond, it must necessarily have the effect of hampering the business of the bank and impairing its functions and efficiency as an agency of the Government. On the other hand, if the lien only becomes effective on insolvency, it is nothing more than a priority or preference, and equally beyond the power of a national bank.

The Circuit Court of Appeals cites the cases of United States vs. Robertson, 5 Peters, 641, and Planters Bank vs. Sharp, 6 Howard, 323, in support of its position that a state may have a lien on the entire assets of a national bank. These cases were decided long before the National Banking Act was passed and they deal exclusively with state banks. We do not understand that state banks are agents or instrumentalities of the state government; but to the contrary, the primary purpose of banks created under charters granted by the states is private gain to the incorporators. We do not know what were the express powers given the Bank of Sommerset, involved in the case of United States vs. Robertson, but it may be safely assumed they were not identical with the powers of a national bank. It is probable that the United States was a preferred creditor of the Bank of Sommerset as it would be today under the Federal statute (31 U. S. C. A. 191), but this is not true as to a national bank. (Cook County National Bank vs. U. S., 107 U. S. 445.)

Furthermore, it has been pointed out by this Court that the primary purpose of creating a national bank is not private gain to its incorporators, but the creation of an agency or instrumentality of the National Government, designed to aid in the administration of an important branch of the public service. Certainly such a bank is not on a parity with state banks; and we do not see how decisions relative

to state banks, created solely under state law, are helpful to determine the powers of a national bank.

We respectfully submit that the decisions cited do not sustain the position of the Circuit Court of Appeals.

The Circuit Court of Appeals seems to consider a *sufficient pledge* of specific collateral as harmful to general depositors as a general lien on the bank's entire assets. We think there is a vast difference in the effect of the two types of security. Of course, if the bank pledged its entire assets, including its money, it would go out of business. If it gives a general lien, depositors and others deal with the bank at their peril; whatever they acquire from the bank may be claimed under the general lien. On insolvency a creditor with specific collateral is limited in his advantage to the collateral he holds. If it shrinks and becomes less than the debt, as to the difference he must share pro rata with unsecured creditors, while a creditor holding a general lien takes all the assets in the receiver's hands, if necessary, to pay his debt. If the lien does not consume all assets held by the receiver when they shrink in value, the reduction in the pro rata to unsecured creditors is multiplied by the relatively greater portion going to the lien creditor. A general lien defeats completely the equal distribution provision of the National Banking Act and runs counter to the whole spirit and purpose of the Act. This alone, we think, is sufficient to render it invalid, regardless of when or how it arises. Such liens were not contemplated or intended to be within the power of a national bank.

5.

No Lien Attaches to the Bond Required of a National Bank.

Laws creating liens as contended for in this case should be strictly construed, particularly when the rights of third persons (here, common depositors) are involved. Certainly the only bond that can have the effect of creating this all-absorbing lien in any case is the statutory bond prescribed

by Sect. 1252. This statutory bond is conditioned "for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State," and to faithfully account, etc., and is to be not less than the amount of the deposit, and under such a bond the State may deposit an amount equal to the bond.

The bond required of a national bank is not such a statutory bond for two reasons:

(1) The first condition of the bond is one the bank cannot make, for it cannot unqualifiedly agree for the State to prescribe its duties or regulate its affairs. (See cases cited above.)

(2) The amount of the bond is double that required by the statute of a state bank. Section 1256 of the Code of Georgia, 1910 (see appendix), provides:

> "* * * and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of the money to be deposited with it."

The change in the amount of the bond is a very material change, because the statutes prescribe that the lien shall be for the amount of the bond, not the amount of the deposit. Under the statutory bond the depository may receive deposits equal to the amount of the bond, but under the bond required in 1928 of a national bank, it could receive State deposits of only half the amount of the bond. So we say that under a proper construction of the State laws no lien arose upon the execution of the bond by a national bank.

If it is considered that the lien arises by contract, then it is only a valid contract within the purview of the State statutes that could create a valid lien. A national bank certainly cannot make a contract agreeing to perform all such duties as shall be required of it by the General Assembly or the laws of the State. The lower court answers

this contention by saying that no duties except to receive and account for public monies had been required of the bank. It is a novel rule to us that an agreement, invalid in its inception, is rendered valid because nothing has been demanded under it. However, the statute contemplates at least one other duty to the State, and that is to keep the Treasurer informed at all times of its financial condition. (Sect. 1254, Code of Georgia, 1910. See appendix.)

The only bond the Governor was authorized to take by the law of Georgia was a bond for double the amount of the deposit. The Circuit Court of Appeals says that the amount of the bond was not double the deposit. Then the Governor violated his authority and the bond contract was not in compliance with the statute, because the statute demands a bond double the amount of the deposit.

Why Writ Should Issue.

A determination of the effect of the state statutory lien, the property to which it attaches, and the time when it attaches, are questions of vital concern to the thousands of depositors who deal with banks appointed state depositories, and likewise of great concern to the large central banks and the Federal Reserve Banks who lend vast sums of money to both state and national banks that may be state depositories.

The Comptroller is vitally concerned as to the effect of such statutes, that he may perform his duties in the proper distribution of an insolvent bank's assets; and if he is to be charged with having tacitly approved depository contracts, as the Circuit Court of Appeals indicates he is, then he is certainly entitled to have this Court determine the scope of the contract for which he is so chargeable.

We respectfully submit that this case presents Federal questions of importance, involving a great instrumentality

of the Government, and that they should be settled by this Court.

Respectfully submitted,

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APPENDIX.

Sections of the Code of Georgia Cited.

(Park's Annotated Code or Code of 1910)

Sect. 218, Code of Ga. Each security on the bond of the treasurer shall make oath that he is bona fide worth, over and above his debts, exemptions and liabilities of all kind, property in realty and personalty not less than some specified sum to be stated in said oath, which oath shall be attached to said bond, and recorded therewith. He may, by express stipulation in writing, limit his liability to a specific sum to be stated in said bond; and all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the treasurer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof.

Sect. 1252, Code of Ga. Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the executive office, and a copy thereof, certified by one of the Governor's secrefaries under the seal of the Executive Department, shall be received in evidence in lieu of the original in any of the courts of this State; and said bonds, shall have the same binding force and effect as the bond required by law to be given by State treasurers, and, in case of default, shall be enforced in like manner. In fixing the bond to be given by a depository under this section, the Governor shall so fix the same as to make it not less than the amount of money entrusted to said depository, and in no case shall a larger amount of money be deposited in any bank than the amount of the bond, and

the Governor may at any time require additional bond, if necessary, to cover fully the amount deposited or intended to be deposited in such bank.

Sect. 1254, Code of Ga. It shall be the duty of the treasurer to keep advised, and to keep the Governor advised from time to time, of the financial condition of the various State depositories, as well as of the financial condition and standing of the securities on the bonds of such depositories, and if at any time they should become satisfied of the insolvency of any of the depositories, or that the affairs of any of said depositories are in an embarrassed condition, it shall be the duty of the Governor to direct the treasurer to withdraw the money of the State from such depository, and the Governor may declare the position vacant and may proceed to appoint another bank in the same locality to act as such depository for the unexpired term under the rules and regulations prescribed by law. In case the Governor should be advised of the insolvency of the securities on the bond of any of said depositories, it shall be his duty to notify such depository to strengthen said bond, and if at the end of ten days said bond is not strengthened, the Governor shall declare said office vacant, and proceed to fill the same by new appointment.

Sect. 1256, Code of Ga. The treasurer of this State shall not deposit at any one time, or have on deposit at any one time in any one of the depositories of this State for a longer time than ten days, a sum of money belonging to this State that exceeds the bond given by said depository to the State. The treasurer shall check from any depository the amount of the State's money that said depository holds in excess of its bond, and pay the sum into the treasury: Provided, that a State depository may be allowed to hold a sum greater than fifty thousand dollars, but not in excess of one hundred thousand dollars, upon such depository giving a new bond to cover the maximum amount to be deposited with it, and when such new bond has been executed and delivered to the Governor, the old bond shall be discharged and surrendered, and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of money to be deposited with it. The bond to be made by the State depositories may be a personal bond or may be made by a deposit with the State

treasurer of United States bonds or Georgia State bonds, or either one or both of said methods.

Sect. 3256, Code of Ga. A mortgage in this State is only security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place. A mortgage given by a person or a corporation to a trustee or trustees, to secure an issue of bonds, shall, when it is expressly so stipulated therein, embrace and cover after-acquired property of such person or corporation.

Sect. 5948, Code of Ga. A judgment has no lien upon promissory notes in the hands of the defendant; nor are choses in action liable to be seized and sold under execution, unless made so specially by statute.

Sections of the National Banking Act Cited.

Sect. 29, Title 12, U. S. C. A. A national banking association may purchase, hold, and convey real estate for the following purposes, and, excepting as provided otherwise in section 371 of this title, for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Sect. 60, Title 12, U. S. C. A. The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the

preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

Sect. 83, Title 12, U. S. C. A. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

Sect. 90, Title 12, U. S. C. A., as far as pertinent. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: * * * Provided that the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Sect. 91, Title 12, U. S. C. A. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed in this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued

against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Sect. 101, Title 12, U. S. C. A., as far as pertinent. Upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; * * *. Provided, that nothing herein contained shall be construed to modify or repeal the provisions of section 175 of this title, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security * * *.

Sect. 121, Title 12, U. S. C. A., as far as pertinent. Every national banking association organized under the provisions of this chapter, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to 5 per centum of its circulation, to be held and used for the redemption of such circulation, which sum shall in no case be counted as a part of its legal reserve; * * *

Sect. 194, Title 12, U. S. C. A. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 802.

JOHN C. LEWIS, AS RECEIVER OF THE HANCOCK NATIONAL BANK OF SPARTA, GEORGIA, *Petitioner,*

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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INDEX.

	Page
BRIEF FOR PETITIONER	1
Reference to Opinion of Lower Court	1
Jurisdiction	2
Statement of the Case	2
Assignments of Error	5
Summary of Argument	6
Argument	7
Lien Invalid Under Any Construction	7
Lien Invalid as Construed by the U. S. Circuit Court of Appeals	8
Lien Invalid as Construed by Georgia Supreme Court	12
Lien Is Ultra Vires	14
No Lien Attaches to the Bond Required of a National Bank	23
Conclusion	25
Appendix	26

TABLE OF CASES CITED.

Anthony vs. Household Sewing Machine Co. (R. I.) 5 L. R. A. 575	16
Baltimore & O. R. Co. vs. Smith, 56 Fed. (2d) 799	19
Barrett vs. Van Pelt, 268 U. S. 85, 69 L. Ed. 857 (1)	22
Burton vs. Smith, 13 Peters 464	10
Central Transp. Co. vs. Pullman's Car Co., 139 U. S. 24, 49	23
Collins vs. New Hampshire, 171 U. S. 30	10
Cook County Nat. Bank vs. U. S., 107 U. S. 445	10, 15
Davis vs. Elmira Savings Bank, 161 U. S. 275	7, 12, 14
Farmers & Mechanics Nat. Bank vs. Dearing, 91 U. S. 29	15

Page

Easton vs. Iowa, 188 U. S. 220 15
Fidelity & Deposit Co. of Md. vs. W. K. Howard, Rec. 67 Fed. (2d) 961 3
First Nat. Bank of San Jose vs. California, 262 U. S. 366, 67 L. Ed. 1030 14
International Products Co. vs. Vails Estate (Vt.) 123 A. 194, 197 (7) 18
Jones vs. Guaranty Indemnity Co., 101 U. S. 626..... 21
Logan County Nat. Bank vs. Townsend, 139 U. S. 67.. 15
Marion vs. Sneeden, 78 L. Ed. 521; Advance Opinions, Oct. Term, 1933, No. 7 15
Mathis vs. Morgan, 72 Ga. 517 .....12, 13
Memphis R. R. Co. vs. Commissioner, 112 U. S. 609, 623 16
Oregon Ry. Co. vs. Oregonian Ry. Co., 130 U. S. 1, 26.. 23
People vs. Nixon, 229 N. Y. 356, 128 N. E. 245 (5).... 16
Schaun vs. Brandt, 116 Md. 560, 82 A. 551 16
Seay vs. Bank of Rome, 66 Ga. 609 .....8, 12
Standard Accident Ins. Co. vs. Luther Williams Bank & Trust Co., 45 Ga. App. 831 18
State vs. Brobston, 94 Ga. 95.....9, 12, 18
Steffey, Charles H., Inc. vs. Bridges, 140 Md. 429, 117 A. 887, 888 16
Texas & P. R. Co. vs. Pottorff, 78 L. Ed. 514; Advance Opinions, Oct. Term 1933, No. 7 15
U. S. vs. Katz, 271 U. S. 354, 70 L. Ed. 986, 988..... 22

TABLE OF STATUTES CITED.

Code of Georgia and Georgia Laws

Sect. 218, cited 3, 4, 8
Quoted in full in Appendix 26

Sect. 1252, cited 4, 5, 8
Quoted in full in Appendix 26

Sect. 1254, cited 27
Quoted in full in Appendix

Page

Sect. 1256, cited 26
Quoted in full in Appendix 27

Sect. 3256, cited 9
Quoted in full in Appendix 28

Sect. 5948, cited 10
Quoted in full in Appendix 28

Georgia Laws 1933, pp. 78, 83, Sect. 6, cited 28
Quoted in full in Appendix

National Banking Act, Title 12, U. S. C. A.

Sect. 29, cited 12
Quoted in full in Appendix 29

Sect. 60, cited 12
Quoted in full in Appendix 30

Sect. 83, cited 13
Quoted in full in Appendix 30

Sect. 90, cited 17
Quoted in part in Appendix 30

Sect. 91, cited 6, 10, 13
Quoted in full in Appendix 21, 31

Sect. 101, cited 12
Quoted in part in Appendix 31

Sect. 121, cited 12
Quoted in part in Appendix 31

Sect. 194, cited 7, 10, 21
Quoted in full in Appendix 32

Amendment to Sect. 90, approved June 25, 1930, cited 16, 17

Judicial Code, Sect. 240 (a); 28 U. S. C. A., Sect. 347 .. 2

IN THE

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vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

I.

OPINIONS BELOW.

The trial court filed no opinion in this case, but its findings of fact and conclusions of law are set forth in the Record, pages 11 to 14, inclusive. The opinion of the Circuit Court of Appeals is reported in 67 Fed. (2d) 961.

II.

JURISDICTION.

This Court has jurisdiction of this case under Judicial Code Sect. 240 (a), as amended by the Act of February 3, 1925; Title 28 U. S. C. A., Sect. 347, having granted on March 19, 1934, writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court in this case (R. 35). The judgment of the Circuit Court of Appeals to be reviewed was entered December 7, 1933. (R. 26)

III.

STATEMENT OF THE CASE.

On July 6, 1928, the Governor of Georgia appointed Hancock National Bank of Sparta, Georgia, a State depository, for a term of four years, in which monies collected for State taxes should be deposited, and required the bank to give a fidelity bond in the sum of $10,000. (R. 5 and 6.)

On July 12, 1928, the board of directors of Hancock National Bank, to make effective the appointment of said bank as a State depository, authorized its president to execute a bond in the sum of $10,000. (R. 7.) On the same date the bank, as principal, and the Fidelity and Deposit Company of Maryland, as surety, executed a bond to the Governor of Georgia, and his successors in office, in the sum of $10,000 (reciting the appointment as a State depository and its acceptance), conditioned for the faithful performance of all duties as should be required of the bank by the General Assembly or laws of Georgia, and to account for all public money or effects that might come into its hands during its continuance in office. (R. 6 and 7.)

Thereafter, on July 31, 1928, the Governor issued an order that the Tax Collector of Hancock County pay over to said bank all monies collected by him on account of State taxes, except such as might be paid directly into the State treasury. (R. 8.)

The Hancock National Bank became insolvent, and on May 23, 1932, the Comptroller of the Currency appointed W. K. Howard receiver of said bank. On the date of the appointment of the Receiver the amount of State tax funds on deposit was $6,157.41. (R. 13.)

On July 28, 1932, the Fidelity & Deposit Company of Maryland paid to the State the amount of its deposit in the closed bank with interest, and took an assignment of the right and interest of the State, together with any preferences or liens it might have on account of the funds deposited with the Hancock National Bank. (R. 13.)

Upon refusal of the Receiver to recognize any lien or preference claimed by the surety company on account of said deposit and the depository bond given by said bank, the surety company, as subrogee and assignee of the rights of the State of Georgia under the said depository bond, filed suit in equity in the Superior Court of Hancock County, Georgia, against W. K. Howard, in his capacity as Receiver of said national bank, seeking to establish a lien, ranking in priority from the date of the execution of said bond, on all of the property of said bank and the proceeds of all assets coming into the control of said Receiver to the amount of the State's balance on deposit in the bank at the time of the Receiver's appointment. This suit was removed to the United States Court.

Plaintiff in said suit based its claim of lien on Sections 1252 and 218 of the Code of Georgia, as construed by the Supreme Court of Georgia. (See Par. 10 of respondent's bill, R. 3.)

The material parts of these Code sections are as follows:

> "Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a

faithful account of the money or effects that may come into their hands during their continuance in office * * * and said bonds shall have the same binding force and effect as the bond required by law to be given by State treasurers, and in case of default, shall be enforced in like manner. * * *

Sect. 1252, Park's Ann. Code of Ga.

"* * * all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the treasurer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof."

Sect. 218, Park's Ann. Code of Ga.

(The Georgia Code sections cited are set forth in full in the appendix.)

The Receiver filed his motion to dismiss plaintiff's petition, asserting: (1) The lien sought to be established is invalid; (2) there is no equity in the petition; (3) the execution of the bond was beyond the charter power of a national bank, without authority of law and contrary to public policy; (4) the execution of said bond did not create a valid lien in favor of the State on the assets of said bank. (R. 10.)

The trial court sustained the motion and entered a judgment dismissing the petition insofar as it sought to establish a lien upon the properties of the bank in the hands of said Receiver, but retained the petition for the sole purpose of allowing plaintiff to establish its claim as a general creditor. (R. 11.)

A stipulation by the Receiver in open court admitted all allegations of the petition except the claim of lien (Court's finding of Fact, R. 12); whereupon, the District Court en-

tered its final decree denying the lien contended for and allowing plaintiff's claim in the amount of $6,206 as a general creditor. (R. 14.)

From this final decree plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. (R. 15.) The Circuit Court of Appeals reversed the judgment of the District Court on December 7, 1933 (R. 19), and decided that the surety company is entitled to the lien it seeks on all the bank's assets in the hands of the Receiver. (R. 19.)

While said case was pending in the Circuit Court of Appeals on a stay of mandate W. K. Howard died, and John C. Lewis, as Receiver of said bank (petitioner here), was substituted for the said Howard as a party in said case in the Circuit Court of Appeals. (R. 33.)

John C. Lewis, as Receiver, then filed his petition to this Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals, and certiorari was granted March 19, 1934. (R. 35)

IV.

ASSIGNMENTS OF ERROR.

(1) The Circuit Court of Appeals erred in deciding in substance and effect that the statutes of Georgia declaring a lien on all the property of a State depository bank from the date of the depository bond are valid as applied to a national bank qualifying as a State depository.

(2) The Circuit Court of Appeals erred in deciding that a national bank has power to give a general lien on all of the property of the bank to secure a deposit of State funds.

(3) The Circuit Court of Appeals erred in deciding that the lien prescribed by the statutes of Georgia in the case of a depository bank is enforceable against the bank's property of all kinds in the Receiver's hands.

(4) The Circuit Court of Appeals erred in construing Sects. 1252 and 218 so as to create a valid lien on all assets

of a national bank in Georgia—a lien existing from the time of the execution of the depository bond, but sleeping and innocuous until insolvency, when it becomes awakened, and attaching to all assets of every character in the hands of the receiver, destructive of the rights of common creditors.

V.

SUMMARY OF ARGUMENT.

(1) A lien in favor of the State, declared by the statutes of Georgia to arise upon the execution of the State depository bond, is invalid and void as applied to a national bank, whether it be construed as arising on the date of the bond but ineffective until a receiver is appointed, or construed as arising on the date of the bond and binding all the property of the bank from that date.

(2) The lien as construed by the United States Circuit Court of Appeals is nothing more than a preference or priority, and violates Sects. 91 and 194 of Title 12, U. S. C. A., prohibiting preferences and providing for ratable distribution on insolvency.

(3) The lien as construed by the Supreme Court of Georgia binds and affects all the property of the bank from the date of the bond, and as so construed is invalid and void as applied to a national bank, because it impairs the functions of the bank as an agency and instrumentality of the National Government.

(4) State statutes can neither extend nor limit the powers of a national bank, and it is beyond the powers of a national bank, as measured by the Federal statutes, to give the lien as construed by the United States Circuit Court of Appeals, or the lien as construed by the Supreme Court of Georgia.

(5) When a national bank is designated a State depository and it gives a bond to secure State deposits, no lien whatever is intended or arises, as the bond required of a national bank is different from the bond required of a state bank.

VI.

ARGUMENT.

Lien Invalid Under Any Construction.

The Circuit Court of Appeals takes the view that since the national bank was not required to accept the appointment as a State depository nor give a personal bond, its making bond, referring to its appointment under the statute, establishes contractually the statutory lien.

Neither the appointment nor the bond expressly provide that the State shall have a lien. Whether the lien is considered as arising contractually, on the theory the State statute is written into the bond, or as created by the State statute, the questions presented are the same, to-wit: The validity of the statute as applied to national banks and the power of national banks to give the statutory lien. Relevant provisions of the National Banking Act must be written into the bond as well as State statutes. (Davis vs. Elmira Savings Bank, 161 U. S. 275, 287.)

It is our view that the lien declared by the State statute is equally invalid and ineffective as to the receiver of an insolvent national bank, whether it is construed as intended to be effective and operative only on the appointment of a receiver, or as intended to bind and affect the property of the bank from the date of the bond.

If the first construction be the correct one, then the so-called lien loses its character as a lien and becomes a priority, and so conflicts with the provisions of the National Banking Act prohibiting preferences and providing for ratable distribution among creditors, 12 U. S. C. A., Sects. 91 and 194. (See appendix.) If the second construction be correct, as contended by the surety, then the lien binds all the property of the bank from the date of the bond to the amount of the bond, and is a lien beyond the power of a national bank to give, and beyond the power of a state legislature to authorize, as such a lien will necessarily impair

the functions and efficiency of a national bank, an agency and instrumentality of the Federal Government.

2.

Lien Invalid as Construed by the U. S. Circuit Court of Appeals.

It is the Circuit Court of Appeals' construction that the lien is not intended to affect the commercial assets while the bank is a going concern, but as to such assets becomes effective on the appointment of a receiver. This construction, however, of Sects. 1252 and 218 of the Code of Georgia, declaring a lien on the property of a depository bank, is in conflict with the construction given those sections by the Supreme Court of Georgia.

While it is true that the State courts were called upon to construe the sections in cases arising after the insolvency of *state* banks, there is nothing in the decisions of the State courts to indicate that a distinction is made between real estate and other assets, nor is there anything to indicate that the lien is not effective as to commercial assets while the bank is a going concern.

We point out with particularity the following language of the State court decisions:

> "Plaintiffs in error contend that the state has no lien on the notes, accounts and choses in action of said bank, because under our law a judgment fixes no lien on such property, and no levy and sale thereof can be had at law. The reply is, that upon the execution of the bond, the law gave the state a lien upon all the property of the bank; not upon such property only as a judgment would fix a lien upon; not upon such property only as is subject to levy and sale; but upon all the property of the bank. Are not notes and accounts property? Can any reason be given why it is not competent for the legislature to give a lien upon notes and accounts, as well as upon any other property?"
>
> Seay et al. vs. Bank of Rome et al., 66 Ga. 609, 614.

"We think they were bound to know of the existence of this lien; the law created the lien and expressly provided that it should exist, from the time of the execution of the bond, upon all the property of the principal and sureties; and everybody must take notice of this; the law gives them this notice."

Simpson & Ledbetter vs. Mathis, Sheriff, 79 Ga. 159, 161.

"To the granting of this order the State excepted. Were the notes in question assets of the bank upon which the State's lien takes effect, without reference to the liability of the bank to the makers of these notes for amounts justly due them, respectively, on their deposits? We think not. On the contrary, in our opinion, these notes were assets only in so far as there might be due to the bank balances upon them after deducting the amounts of the respective deposits, if those deposits were made bona fide while the bank was engaged in the transaction of its regular business and had control of its books."

State vs. Brobston, Receiver, 94 Ga. 95, 97.

The Circuit Court analogizes the depository lien to a Georgia chattel mortgage on a stock of merchandise; but it will be noted that the law of this State in regard to such chattel mortgage expressly provides:

"* * * in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place." (Georgia Code of 1910, Sect. 3256. See appendix.)

As to a chattel mortgage on a stock of goods, when the Legislature intended that the lien should be lost on the goods disposed of and should attach to those acquired, it expressly said so. We see nothing in the State depository law which authorizes the court to write into it a provision which the Legislature has seen fit to leave out.

The same criticism may be made of the lower court's analogy to a judgment lien, the Code of Georgia expressly

relieving choses in action from the lien of and seizure under a judgment. (Code of Georgia, Sect. 5948. See appendix.)

However, assuming, without conceding, that this is a correct construction of the State statute, it means the State has no security in the case of a national bank until insolvency, as far as the bank's commercial assets are concerned; that is, such assets as money, notes, accounts, securities, choses in action and the like, which constitute the bulk of the valuable assets of a national bank.

The following language of this Court is apposite here:

> "We have already said that the judgment created a lien, now it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere; if this were not the case, it would cease to be a lien."
>
> Burton vs. Smith, 13 Peters, 464, 483.

In short, the effect of the statute, as so construed, is to give the State a preference or priority on insolvency.

In the case of Collins vs. New Hampshire, 171 U. S. 30, on page 34, this Court said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The lien having the effect of giving the State a preference on insolvency and preventing ratable distribution, it necessarily conflicts with Sects. 91 and 194, U. S. C. A., Title 12.

Referring to Sect. 194 U. S. C. A., Title 12, this Court, in the case of Cook County National Bank vs. U. S., 107 U. S. 445, 450, pointed out:

> "This section provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming notes."

If the assets to be distributed are assets belonging to the bank, under Sect. 194 they must be distributed ratably; and for any claimant to receive more than a ratable distribution, he must show a title in the property to be distributed, either legal or equitable, in which case it is not a distribution of the assets of the bank, but a return to the claimant of something that is his. Unless the Georgia statutory lien is such as gives to the State a present existing and continuing interest or title in the property of the bank from the date of the bond, it has nothing to be returned to it, and the National Banking Act, the paramount law, prohibits any distribution to it or its assignee other than a ratable distribution.

The State's lien on the commercial assets of a bank, as construed by the Circuit Court of Appeals, takes hold of nothing, but lies sleeping upon the threshold of insolvency, ready to arouse and seize all the bank owns the moment the receiver enters that threshold. But that moment is too late in the case of a national bank, because the receiver enters under the protection of the National law, which shuts the door on the then awakening lien. (12 U. S. C. A. 91.)

Pertinent here is the language of this Court in the case of Davis vs. Elmira Savings Bank, as follows:

> "Nor is the repugnancy between the state statute and the act of Congress removed by the contention that inasmuch as ratable distribution applies only to that which belongs to the bank, therefore there is no conflict between the state statute and the act of Congress. This argument can only mean that the effect of the state statute is to make the Savings Bank, in the event of insolvency of the National Bank, the owner of a sum equivalent in amount to the sum of money which was by it deposited. But to say this aggravates the conflict between the state law and the act of Congress. If the state statute is to be read as saying that whenever the persons named therein deposit money with a national bank they shall be treated as

> the owner of an equal sum of the assets of the bank when it becomes insolvent, then the state statute precludes, in a most flagrant way, the possibility of the ratable distribution ordered by the act of Congress."
>
> Davis vs. Elmira Savings Bank, 161 U. S. 275, 288.

The statement in the opinion of the court below (R. 24) that "The creation by means of a bond of a lien against the entire assets of a State bank for a debt due the United States was upheld in United States v. Robertson, 5 Pet. 641", is answered by the following excerpt from Note 1 of the opinion of this court in Texas & Pacific Railway v. Pottorff, Receiver of the First National Bank of El Paso, decided February 5, 1934: "United States v. Robertson, 5 Pet. 641, and Planters Bank v. Sharp, 6 How. 300, have no application to the National Banking Act."

3.

Lien Invalid as Construed by Georgia Supreme Court.

The statutes here under consideration, as construed by the State courts, create a lien on every asset of the bank of every character from the date of the bond. There is no separation, no half-way ground; no specific property can be said to be affected while other assets escape.

See:

> Seay vs. Bank of Rome, 66 Ga. 609;
> Simpson & Ledbetter vs. Mathis, 79 Ga. 159;
> Mathis vs. Morgan, 72 Ga. 517;
> State vs. Brobston, Receiver, 94 Ga. 95.

What then is the necessary effect of such statutes on the function of a national bank? The bank cannot sell the property it is authorized to acquire and dispose of under Title 12 U. S. C. A., Sects. 24 and 29, for no one would take it subject to a lien to the amount of the bond. Even the dividends the bank may declare under 12 U. S. C. A., Sect. 60, will be subject to the lien. How shall a national bank

dispose of stock it acquires under 12 U. S. C. A., Sect. 83, which it is required to sell within six months from the date of purchase, if there is a lien attached to it? The very bonds a national bank is required to deposit with the Treasurer of the United States, under 12 U. S. C. A., Sect. 90, would be subject to the lien of the State if the lien declared by the State law is effective, thereby destroying the function of the national bank as a depository of public money of the United States and a financial agent of the Government.

Is it possible to conceive a lien being required on every asset of a bank except in contemplation of insolvency and to prevent the application of the bank's assets pro rata to its creditors? In fact, the Supreme Court of Georgia, in the case of Mathis vs. Morgan, 72 Ga. 517, on page 522, said in effect that the bond was required "in apprehension that the Governor might make a mistake in its (the bank's) solvency." Does not such a lien clearly offend against 12 U. S. C. A., Sect. 91?

How can a national bank procure an issue of circulating notes after the lien of the State attaches to the bonds it must deposit with the Treasurer of the United Sates as provided in 12 U. S. C. A., Sect. 101? Is it thinkable that the Treasurer of the United States must accept bonds subject to a lien? How can the bank maintain a reserve or pledge collateral with the Federal Reserve or other banks in the ordinary course of its banking business, if its money and collateral are subject to a lien of the State? Was it ever contemplated that the money deposited by a national bank under Sect. 121 of Title 12 U. S. C. A., to be used for the redemption of its circulating notes, shall be subject to a lien of the State? (The relevant part of sections of the National Banking Act cited above are quoted in the appendix.)

A consideration of the foregoing questions makes it clear that a state statute creating a lien from the date of the bond is in conflict with many provisions of the National

Banking Act and violative of its spirit and purpose, and, as applied to a national bank, is void.

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they are created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.
>
> Davis vs. Elmira Savings Bank, 161 U. S., 275, 283

See also:

> First Nat. Bank of San Jose vs. California, 262 U. S. 366, 67 L. Ed. 1030.

4.

Lien is Ultra Vires.

It is established by the repeated decisions of this Court that the National Banking Act constitutes a complete system for the establishment and government of national banks, and provides everything essential to the winding up and distribution of their effects, neither limited nor enlarged by other statutory provisions, state or Federal, with respect to the settlement of demands against insolvent banks; and that Federal statutes alone constitute the measure of authority of such banks; and they cannot exercise any power except those expressly granted and such as are necessary for the purpose of carrying into effect the powers expressly granted.

See:

Cook County Natl. Bank vs. U. S., 107 U. S. 445
Farmers & Mechanics Natl. Bank vs. Dearing, 91 U. S. 29
Logan Natl. Bank vs. Townsend, 139 U. S. 67
Easton vs. Iowa, 188 U. S. 220.

There is no provision in the National Banking Act giving a national bank the express power to give a lien on all of its assets of every kind and character to secure a deposit of State funds, whether such a lien be construed as effective from the date of the bond or as effective only upon the appointment of a receiver for the bank.

This Court in two recent decisions established beyond further controversy that a national bank did not have the power to secure either private or public deposits by a pledge of assets prior to the amendment to the National Banking Act approved June 25, 1930.

Texas & P. R. Co. vs. Pottorff, 78 L. Ed. 514; Advance Opinions, October Term, 1933, No. 7.
Marion vs. Sneeden, 78 L. Ed. 521; Advance Opinions, October Term, 1933, No. 7.

It necessarily follows that if a national bank did not have the power prior to June 25, 1930, to pledge specific assets to secure public deposits, it did not have the power to give a lien on all of its assets, including assets to be acquired in the future, for the purpose of securing public deposits.

The bond, the execution of which respondent contends had the effect of giving a lien to the State on all the assets of the bank, was executed July 12, 1928, and was therefore ineffective to create or carry with it the lien declared by the Georgia sfatutes.

The bond given by the bank in July, 1928, and the lien declared by Georgia statute as incident thereto, under the recent decisions of this Court above recited are ultra vires,

absolutely void and a mere nullity; in short, contrary to the public policy of the United States.

The amendment of June 25, 1930, is not a curative or confirmatory statute, and therefore does not have the effect of validating prior ultra vires contracts that may come within the scope of its provisions. But the validity of the bond and the incident lien declared by State statute depends on the state of the law at the time the bond was executed. In short, the amendment of June 25, 1930, would be ineffective to validate the bond and the lien claimed as incident thereto, even if the amendment could be construed as authorizing liens of the character declared by the statutes of Georgia, as construed either by the Supreme Court of Georgia or by the Circuit Court of Appeals.

> "It is, of course, the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect."
>
> Memphis Railroad Co. vs. Commissioners, 112 U. S. 609, 623.

See also:

Schaun vs. Brandt, 116 Md. 560, 82 A. 551.
Anthony vs. Household Sewing Machine Co. (R. I.) 5 L. R. A. 575
Charles H. Steffey, Inc. vs. Bridges, 140 Md. 429, 117 A. 887, 888.
International Products Co. vs. Vails Estate (Vt.) 123 A. 194, 197 (7)
People vs. Nixon, 229 N. Y. 356, 128 N. E. 245 (5)

Even if the amendment of June 25, 1930, could be construed as authorizing, after June 25, 1930, the lien declared by the Georgia statute, as construed either by the State court or by the Circuit Court of Appeals (which we deny), there is nothing in the record to show that the bank did anything tantamount to a re-execution or reaffirmance of the bond subsequent to June 25, 1930. In fact, the record

does not justify even the assumption that State funds were deposited in the bank subsequent to June 25, 1930, because the order or instruction of the Governor to the county tax collector was to deposit in said bank the money collected by him on account of State taxes, except such as may be paid directly into the State treasury. (R. 8.) The record is silent as to whether any monies were deposited in the bank subsequent to June 25, 1930, or whether all tax monies collected thereafter were paid directly into the State treasury. But we submit that the mere acceptance of deposits of State tax money subsequent to June 25, 1930, would not be tantamount to a re-execution of the bond, or sufficient in itself to show a confirmation or ratification of the bond, or any intent on the part of the bank to give the State a lien on all of its assets.

Independent of any view that may be taken as to the effect of an amendment in 1930 on an ultra vires act of 1928, we submit that the amendment of June 25, 1930, does not authorize or empower a national bank to give a lien on all of its assets, both presently owned and acquired in the future, to secure deposits of public funds.

The amendment reads as follows:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."
>
> Act of June 25, 1930, Chap. 604, 46 Stat. at L.; U. S. C. Title 12, Sect. 90.

We think the language of the amendment, considered in the light of the Senate and House reports on the amendment, clearly shows that it was the intent of Congress to authorize the pledge of specific collateral or giving a surety bond to secure deposits of public money of a State or politi-

cal subdivision thereof, and that it was not contemplated or intended to authorize liens on all the assets of a national bank.

"In Senate report No. 67, 71st Congress, 2nd Session, the Committee based its favorable report upon a letter from the Attorney-General of Minnesota, reading in part as follows:

> 'The United States district court of this district has held that it may not thus pledge its assets to secure private deposits and the trend of authority generally seems to be to the effect that a bank may not in any case pledge its assets to secure a deposit unless authorized by law so to do. The national banks of this State have pledged with the State and the various subdivisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance removed by legislation in Congress which will specifically authorize such pledges by national banks.'

"From House report No. 1657, 71st Congress, 2nd Session, it appears that the committee reported favorably upon the bill because of a request from the Secretary of the Treasury, reading in part as follows:

> 'While the office of the Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safe-keeping and prompt payment of public moneys of the State or political subdivisions thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486.'"

(The foregoing from Baltimore & O. R. Co. vs. Smith, 56 Fed. (2d) 799, 802.)

From the foregoing extracts from the Senate and House committee reports on the amendment of 1930, it appears that what Congress had before it was the suggested want of authority in a national bank to pledge specific assets or give specific security such as the Comptroller had theretofore considered valid. It was the purpose of the amendment to authorize national banks to pledge specific collateral as security for the deposit of funds of States and their political subdivisions, and there is no suggestion that Congress intended to validate all the various and sundry lien laws then of force in the various States, or that may thereafter be prescribed by the various legislatures of the forty-eight States.

We think it cannot be assumed that the Comptroller of the Currency ever understood or considered that national banks in Georgia, by giving surety depository bonds, were giving a lien on all their assets to the State to secure its deposit. This is evidenced by the fact that the law providing for State depositories and declaring a lien has been in existence since 1879, and in that period there have been many national bank failures in this State, but there is no reported case or record showing that the State or any surety on its depository bond attempted to assert a lien against a national bank or considered it had such a lien. Furthermore, the bond required of a national bank was double that required of a state bank, so the Comptroller may safely have assumed that all the incidents and effects of the execution of the bond in the case of a state bank did not follow in the case of a national bank. In fact, it cannot even be assumed that national banks in this State generally gave a depository bond and that the Comptroller necessarily approved thereof, because under the law of this State since 1893 a national bank may qualify as a State depository by depositing with the State Treasurer United States bonds or Georgia State bonds.

The amendment provides that the association may, *upon the deposit with it of public money of a State or any political subdivision thereof*, give security, etc. This langauge clearly indicates that Congress was authorizing security that the bank may give at the time the money is deposited —security of a specific value, which the depositor may take and hold for the safe-keeping and prompt payment of the money deposited. Likewise, when the money is repaid to the depositor, the security is returned to the bank, and the security varies with the deposits made.

Certainly Congress did not intend that a national bank may give a lien on all of its assets dating from the date of the execution of the depository bond and for the amount of the bond, regardless of the deposits made. One day the deposits may be $1,000 and another day the deposits may be $6,000. But regardless of the deposit, the State, under the Georgia law, has a lien on all of the assets of the bank. We do not think the language of the amendment, "of the same kind as is authorized by the law of the State in which the association is located, in the case of other banking institutions in the State," has the effect to extend the authority of a national bank to give any lien that the State law may declare as arising from a deposit of State funds or the execution of a depository bond; but rather Congress meant the pledging or depositing with the State of specific property of the form and character required of state banks by State law, or the giving of a surety bond free of any liens or incidents that may be declared by a State law to attach thereto. In short, we think it was the intent of Congress to authorize such security as inhered in the thing given and not the incidents that may be declared by State statute to attach to the security deposited. State laws quite generally require a deposit with a designated officer of certain specific types of bonds, such as bonds of the State or bonds of the political subdivisions or municipalities, and most generally bonds of the United States, or, as is frequent in

depository laws of the States, plain surety bonds unentangled with liens, preferences or priorities.

Construing the language of the amendment as it ordinarily would be understood and contemplated, the words "give security" would not be considered as including the giving of a lien on all or unidentified property, or the giving of a preference or priority upon insolvency.

If the words "give security * * * of the same kind as is authorized by the law of the State" could be said to ordinarily include liens, preferences and priorities, certainly the amendment would not be given that effect when it is considered in the light of the entire National Banking Act and the many other provisions of the Act with which a lien or preference law would conflict.

The lien declared by State statute, as construed by the Circuit Court of Appeals, as we have heretofore pointed out, is nothing more than a preference or priority, and is in conflict with the equal distribution sections of the National Banking Act (12 U. S. C. Sects. 91 and 194). Certainly Congress did not intend to modify or change those sections for the benefit of States and their political subdivisions, or to permit a State a preference or priority.

To authorize the lien contended for by respondent in this case, which is the lien as declared by the Supreme Court of Georgia, would place the State and its surety in a position superior to that of the United States, and have the effect of seriously impairing, if not totally destroying the functions and usefulness of a national bank. Certainly Congress did not authorize or permit such a lien when it passed the amendment of June 25, 1930.

> "A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law maker is the law."
>
> Jones vs. Guaranty Indemnity Co., 101 U. S. 626

> "The court will not be prevented from giving effect to a legislative intention of which it is satisfied by a

too rigid adherence to the very word and letter of the statute."

Barrett vs. Van Pelt, 268 U. S. 85, 69 L. Ed. 851 (1)

"All laws are to be given a sensible construction, and a literal application of the statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

U. S. vs. Katz, 271 U. S. 354, 70 L. Ed. 986, 988

We think there is a vast difference between pledging specific property, even though the property pledged is of greater value than the money deposited, and a lien on the entire property of a bank; and, likewise, a vast difference between a pledge of specific collateral and a preference or priority. If the bank gives what is really a valid general lien, depositors and others deal with the bank at their peril; whatever they acquire from the bank may be claimed under the general lien. If this became generally known, depositors would not want to deal with the bank while there was a general lien outstanding on all of its property; and for the bank to give such a lien unknown to its unsecured depositors, is to deal with them unfairly, which, when discovered, would result in a lack of confidence in the bank to its injury. To provide for a preference or priority results in unequal and unfair dealing with general depositors.

On insolvency a creditor with specific collateral is limited in his advantages to the collateral he holds. If it shrinks and becomes less than the debt, as to the difference he must share pro rata with unsecured creditors; while a creditor holding a general lien, preference or priority, takes all the assets in the receiver's hands, if necessary, to pay his debt. If the lien, preference or priority does not consume all assets held by the receiver when they shrink in value, the reduction in the pro rata to unsecured creditors is multiplied by the relatively greater portion going to the lien creditor. A general lien, preference or priority defeats

completely the equal distribution provisions of the National Banking Act and runs counter to the whole spirit and purpose of the Act. This alone, we think, is sufficient to render untenable a construction of the amendment that would include liens, preferences, or priorities; and we are confident that this Court will hold that such liens, preferences or priorities were not contemplated or intended to be within the power of a national bank.

Further, the long established rule of construction that grants of charter powers will be strictly construed against the corporation and liberally in favor of the public militates against a construction of the amendment that will include either liens, preferences or priorities.

Central Transp. Co. vs. Pullman's Car. Co., 139 U. S. 24, 49

Oregon Ry. Co. vs. Oregonian Ry. Co., 130 U. S. 1, 26

5.

No Lien Attaches to the Bond Required of a National Bank.

Laws creating liens as contended for in this case should be strictly construed, particularly when the rights of third persons (here, common depositors) are involved. Certainly the only bond that can have the effect of creating this all-absorbing lien in any case is the statutory bond prescribed by Sect. 1252. This statutory bond is conditioned "for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State," and to faithfully account, etc., and is to be not less than the amount of the deposit, and under such a bond the State may deposit an amount equal to the bond.

The bond required of a national bank is not such a statutory bond for two reasons:

(1) The first condition of the bond is one the bank cannot make, for it cannot unqualifiedly agree for the State to prescribe its duties or regulate its affairs. (See cases cited above.)

(2) The amount of the bond is double that required by the statute of a state bank. Section 1256 of the Code of Georgia, 1910 (see appendix), provides:

> "* * * and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of the money to be deposited with it."

The change in the amount of the bond is a very material change, because the statutes prescribe that the lien shall be for the amount of the bond, not the amount of the deposit. Under the statutory bond the depository may receive deposits equal to the amount of the bond, but under the bond required in 1928 of a national bank, it could receive State deposits of only half the amount of the bond. So we say that under a proper construction of the State laws no lien arose upon the execution of the bond by a national bank.

If it is considered that the lien arises by contract, then it is only a valid contract within the purview of the State statutes that could create a valid lien. A national bank certainly cannot make a contract agreeing to perform all such duties as shall be required of it by the General Assembly or the laws of the State. The lower court answers this contention by saying that no duties except to receive and account for public monies had been required of the bank. It is a novel rule to us that an agreement, invalid in its inception, is rendered valid because nothing has been demanded under it. However, the statute contemplates at least one other duty to the State, and that is to keep the Treasurer informed at all times of its financial condition. (Sect. 1254, Code of Georgia, 1910. See appendix.)

The only bond the Governor was authorized to take by the law of Georgia was a bond for double the amount of the deposit. The Circuit Court of Appeals says that the amount of the bond was not double the deposit. Then the Governor violated his authority and the bond contract was not in com-

pliance with the statute, because the statute demands a bond double the amount of the deposit.

CONCLUSION.

If any lien was intended to arise from the execution of a depository bond by a national bank upon its assets, unquestionably such bond and lien to secure deposits of State funds were void at the time the contract was made. It violates the whole plan and spirit of the National Banking Act. It is unfair to general depositors who are entitled to confidently expect that they would be treated equally with all other depositors. Certainly Congress did not by the amendment of June 25, 1930, intend to authorize such a revolutionary and unreasonable invasion by State statutes into the plan and policy of the National Banking Law, or to make national banks subject to State statutes providing for sweeping liens or revolutionary preferences or priorities, merely because they may accept public funds on deposit, such as the lien claimed under Sects. 1252 and 218 of the Code of Georgia, or the recent enactments of the Legislature of this State declaring all public deposits trust funds and providing for a lien on all of the assets of the bank to the amount of the funds deposited. (Act approved March 16, 1933, Sect. 6, Georgia Laws 1933, pages 78, 83. See appendix.)

So we assert without hesitation and with confidence that the judgment of the Circuit Court of Appeals, recognizing and sanctioning such a revolutionary and unreasonable lien as asserted in this case, should be and will be reversed by this Court.

Respectfully submitted,

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APPENDIX.

Sections of the Code of Georgia Cited.

(Park's Annotated Code or Code of 1910)

Sect. 218, Code of Ga. Each security on the bond of the treasurer shall make oath that he is bona fide worth, over and above his debts, exemptions and liabilities of all kind, property in realty and personalty not less than some specified sum to be stated in said oath, which oath shall be attached to said bond, and recorded therewith. He may, by express stipulation in writing, limit his liability to a specific sum to be stated in said bond; and all the property of the treasurer to the full amount of said bond, and the property of the securities to the amount for which they may be severally bound, shall be liable for the faithful performance by the treasurer of the duties of his office, from the date of the execution of said bond; and a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof.

Sect. 1252, Code of Ga. Each of said depositories shall, before entering upon the discharge of their duties, by their proper officers, execute a bond, with good and sufficient securities, to be fixed and approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the executive office, and a copy thereof, certified by one of the Governor's secretaries under the seal of the Executive Department, shall be received in evidence in lieu of the original in any of the courts of this State; and said bonds, shall have the same binding force and effect as the bond required by law to be given by State treasurers, and, in case of default, shall be enforced in like manner. In fixing the bond to be given by a depository under this section, the Governor shall so fix the same as to make it not less than the amount of money entrusted to said depository, and in no case shall a larger amount of money

be deposited in any bank than the amount of the bond, and the Governor may at any time require additional bond, if necessary, to cover fully the amount deposited or intended to be deposited in such bank.

Sect. 1254, Code of Ga. It shall be the duty of the treasurer to keep advised, and to keep the Governor advised from time to time of the financial condition of the various State depositories, as well as of the financial condition and standing of the securities on the bonds of such depositories, and if at any time they should become satisfied of the insolvency of any of the depositories, or that the affairs of any of said depositories are in an embarrassed condition, it shall be the duty of the Governor to direct the treasurer to withdraw the money of the State from such depository, and the Governor may declare the position vacant and may proceed to appoint another bank in the same locality to act as such depository for the unexpired term under the rules and regulations prescribed by law. In case the Governor should be advised of the insolvency of the securities on the bond of any of said depositories, it shall be his duty to notify such depository to strengthen said bond, and if at the end of ten days said bond is not strengthened, the Governor shall declare said office vacant, and proceed to fill the same by new appointment.

Sect. 1256, Code of Ga. The treasurer of this State shall not deposit at any one time, or have on deposit at any one time in any one of the depositories of this State for a longer time than ten days, a sum of money belonging to this State that exceeds the bond given by said depository to the State. The treasurer shall check from any depository the amount of the State's money that said depository holds in excess of its bond, and pay the sum into the treasury; Provided, that a State depository may be allowed to hold a sum greater than fifty thousand dollars, but not in excess of one hundred thousand dollars, upon such depository giving a new bond to cover the maximum amount to be deposited with it, and when such new bond has been executed and delivered to the Governor the old bond shall be discharged and surrendered, and whenever a national bank is selected as a State depository the amount of the bond shall be double the amount of money to be deposited with it. The bond to be made by the State depositories may

be a personal bond or may be made by a deposit with the State treasurer of United States bonds of Georgia State bonds, or either one or both of said methods.

Sect. 3256, Code of Ga. A mortgage in this State is only security for a debt, and passes no title. It may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches to the purchases made to supply their place. A mortgage given by a person or corporation to a trustee or trustees, to secure an issue of bonds, shall, when it is expressly so stipulated therein, embrace and cover after-acquired property of such person or corporation.

Sect. 5948, Code of Ga. A judgment has no lien upon promissory notes in the hands of the defendant; nor are choses in action liable to be seized and sold under execution, unless made so specially by statute.

Georgia Laws Cited.

Sect. 6, Act approved March 16, 1933. It shall be the duty of each and every collecting officer and each and every officer to hold public money, upon any money belonging to any public body coming into his hands, promptly to deposit the same in a bank or depository as hereinafter stated. All funds belonging to the State or any of its bureaus, commissions, boards and or departments shall be deposited in some designated State depository. The county authorities shall designate one or more solvent bank or banks as depositories of all county moneys and moneys belonging to the school funds of the county, and of school districts therein, and of other districts therein organized for any purpose; and if the county authorities shall not have provided for such a depository, the county board of education or the trustees of any school district or the proper authorities having supervision over any other public fund may designate such a depository as to their funds; and if there be no applicable depository selected, the officer collecting or holding any public funds may select a depository. The proper authorities shall require the depository to give bond or make deposit of securities in trust to secure such deposits

as may be made in it. Any bank in this State is authorized to give such bond and/or to secure deposits of public funds by deposits of securities; and the proper authorities are authorized to make contracts with depositories as to interest or compensation of the depository. Upon any deposit of public funds being made in any bank, whether designated as a depository or not, there shall arise in favor of the public body to which such fund belongs a lien on all the assets of said bank, superior to all other liens for the amount of such funds. All funds of any public body upon being deposited in any bank shall be deemed to be held as a trust fund. Money of any public body deposited in any bank by any collecting officer or officer to hold public funds, though deposited in his own name, shall, if the account stand in his name in his official capacity or be marked with words or abbreviations showing his official title, or if the bank otherwise knows that it is public money, be deemed to be funds of a public body within the purview of this Act. No proper authority, nor, when the proper authority consists of a board or tribunal, any member of such board or tribunal shall, where acting in good faith, incur any liability by reason of designating any depository or taking any other official action required of such proper authority under this Act.

Georgia Laws 1933, pp. 83, 84.

Sections of the National Banking Act Cited.

Section 24, Title 12, U. S. C. A. (as amended) empowers a National bank to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt; and buy and sell investment securities, exchange, coin and bullion.

Sect. 29, Title 12, U. S. C. A. A national banking association may purchase, hold and convey real estate for the following purposes, and excepting as provided otherwise in section 371 of this title, for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

Sect. 60, Title 12, U. S. C. A. The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to 20 per centum of its capital stock.

Sect. 83, Title 12, U. S. C. A. No association shall make any loan or discount on the security of the shares of its own capital stock nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previouly contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

Sect. 90, Title 12, U. S. C. A., as far as pertinent. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: * * * Provided, that the Secretary of the Trea-

sury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Sect. 91, Title 12, U. S. C. A. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed in this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against any such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Sect. 101, Title 12, U. S. C. A., as far as pertinent. Upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; * * * Provided, that nothing herein contained shall be construed to modify or repeal the provisions of section 175 of this title, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security * * *.

Sect. 121, Title 12, U. S. C. A., as far as pertinent. Every national banking association organized under the provisions of this chapter, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to 5 per centum of its circulation, to be held and used for the redemption of

such circulation, which sum shall in no case be counted as a part of its legal reserve; * * *

Sect. 194, Title 12, U. S. C. A. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

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IN THE

Supreme Court of the United States

No. 802.

JOHN C. LEWIS, AS RECEIVER OF THE HANCOCK NATIONAL BANK OF SPARTA, GA.,
Petitioner,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondent.

REPLY BRIEF OF PETITIONER.

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INDEX.

	Page
Jurisdiction	1
Date of Deposits With Reference to Act of June 25, 1930	2
Respondent's Argument Summarized	3
Effect of 1930 Amendment	4
State's Lien as Construed by the Supreme Court of Georgia	9
Appendix	13

CASES CITED.

Colquitt, Gov., v. Simpson, 72 Ga. 501	9
Cook County National Bank v. United States, 107 U. S. 445	6
Davis v. Elmira Savings Bank, 161 U. S. 275	9
Fidelity & Deposit Company v. Exchange Bank, 100 Ga. 619	11
Gulf Refining Co. v. U. S., 269 U. S. 125, 70 L. Ed. 195	2
Marion v. Sneedon, 78 L. Ed. 521, Advance Opinions, October Term, 1933, No. 7	4, 5
Scott v. Armstrong, 146 U. S. 493	10
Seay, et al. v. Bank of Rome, 66 Ga. 609, 614	10, 12
Simpson and Ledbetter v. Mathis, Sheriff, Ga. 159	11
Simpson v. Mathis, 79 Ga. 159	9
State v. Brobston, 94 Ga. 95	10
Texas & P. Ry. Co. v. Pottorff, 78 L. Ed. 514, Advance Opinions, October Term, 1933, No. 7	5
United States v. Butterworth-Judson Corporation, 267 U. S. 387	6

STATUTES.

Sec. 237, Judicial Code (Sec. 344, Title 28, U. S. C. A.)	1
Sec. 240 (a) Judicial Code (28 U. S. C. A. Sec. 347 (a)	1
Sec. 137, Title 12, U. S. C. A.	5
Sec. 101, Title 12, U. S. C. A.	5
Sec. 137, Title 12, U. S. C. A.	6
Sec. 90, Title 12, U. S. C. A.	7
Sec. 91, Title 12, U. S. C. A.	8



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Respondent.

REPLY BRIEF OF PETITIONER.

Jurisdiction

The respondent expresses doubt of this Court's jurisdiction to review the decision of the Circuit Court of Appeals, on the ground that the judgment of that Court lacks the requisite finality required by Section 237 of the Judicial Code (Sec. 344, Title 28, U. S. C. A.).

The section cited deals exclusively with review by this court by appeal or certiorari of final judgments and decrees rendered by the highest court of a State. This case is here by virtue of Judicial Code Section 240(a) (28 U. S. C. A. Sec. 347 (a).).

As the record in this case plainly shows, nothing remains to be done in the trial court except to enter a judgment directing the Receiver to pay respondent the claim in full before making any payment to general creditors. The instruction for further proceedings not inconsistent with the opinion was equivalent to a direction to enter a judgment for respondent in the sum of $6,157.41 principal and $48.59 interest.

> Gulf Refining Co. v. U. S., 269 U. S. 125, 70 L. Ed. 195.

If the respondent has any other cause of action against petitoner as receiver, on the trust fund theory or otherwise, the courts are open to him.

DATE OF DEPOSITS WITH REFERENCE TO ACT OF JUNE 25, 1930.

On page 4 of Respondent's brief it is suggested that the statement of the case should be amended by adding thereto the further fact that the tax funds in question were deposited not earlier than December, 1931, and not later than May, 1932, the obvious purpose of this being to bring the case under the operation of the Act of June 25, 1930.

The printed transcript of record does not indicate whether the deposits, aggregating $6,157.41 at the time of the bank's suspension, had been made prior to or subsequent to June 25, 1930. This phase of the matter had not been emphasized in the Courts below inasmuch as the decision of this honorable Court in the case of Marion v. Sneeden (dealing with the power of national banks, prior to June 25, 1930, to pledge assets to secure public deposits), was not rendered until February 5, 1934, and the Circuit Court of Appeals rendered its decision on December 7, 1933. The printed transcript of record *does* indicate that the deposits were made subsequent to July 31, 1928 (R. pg. 2), and the Comptroller of the Currency, in filing his brief

as *amicus curiae*, proceeded, insofar as the reference therein to the City of Marion case is concerned, exclusively on the printed record in the case. After receipt of brief of Respondent on the merits, investigation was made, and on April 29, 1934, the facts with reference to the dates of said deposits were first made known to the Comptroller of the Currency and they were first made known to counsel for Petitioner a few days prior thereto. We are, of course, willing that the full facts may be shown in this respect, and there is attached hereto (Appendix p. 13) copy of letter of April 29, 1934, from the Receiver to the Comptroller, together with the transcript of the deposit account therein referred to setting forth the dates of said deposits. This transcript discloses that the account had a deposit balance of $5,757.58 on June 7, 1930, and that no deposits or withdrawals were made thereafter until June 27, 1930. Deposits substantially in excess of the deposit balance of $6,157.41 (on hand at suspension) were made in the account from time to time, subsequent to June 25, 1930. Of course, withdrawals also were made. This situation may require an application of the rule that where monies are received and disbursed over a period of time, the presumption is that they are disbursed in the order of their receipt. Poisson v. Williams, 15 Fed. (2) 582.

RESPONDENT'S ARGUMENT SUMMARIZED.

The arguments presented in respondent's brief may be summarized substantially thus:

(1) The lien asserted is created by statute and is not a contract lien as declared by the Circuit Court of Appeals. As to all deposits made by the State of Georgia subsequent to the Amendment of June 25, 1930, the State enjoyed the benefit of this Amendment, which validated the lien asserted by respondent.

(2) The statutes of Georgia creating this lien, as construed by the Supreme Court of Georgia, do not interfere

with the ordinary operations of a bank or impair its efficiency as a going concern, because the bank has the right of unrestricted alienation of its assets, free of the State's lien.

EFFECT OF 1930 AMENDMENT.

Whether the lien sought to be enforced by the respondent is a lien imposed by statute or one created by the voluntary act of the parties, it does not arise or come into existence merely from the fact of deposit of State funds in a state or a national bank. While undoubtedly it was the purpose of the Georgia statute to safeguard and protect the deposit of funds belonging to the State in banks and to provide for a lien in order to obtain this protection, the lien which is the subject-matter of this controversy could only arise (under the plain letter of the Georgia statute) upon the acceptance by the bank of an appointment from the Governor as a State depository and the execution of the bond required of it by the Governor in conformity with this statute.

Prior to the recent act of the General Assembly of Georgia, approved March 16, 1933 (petitioner's brief, page 28) the mere deposit of State funds in a bank created no lien in favor of the State upon the assets of the bank. The State's lien came into existence only upon the execution of a depository bond. The depository bond in this case was executed in 1928, at a time when a national bank was without authority to give security for the deposit of funds belonging to the State of Georgia. It thus seems clear that this bond was utterly void.

> Marion vs. Sneeden, 78 L. Ed. 521, Advance Opinions, October Term, 1933, No. 7.

Assuming, without conceding, that the Amendment of June 25, 1930, would authorize a national bank to execute

a depository bond in Georgia, giving rise to a lien in behalf of the State from the date of the execution of the bond for the amount of the bond upon all assets of the bank, it necessarily follows that in order for the State of Georgia to claim the benefit of such a lien there must exist between it and the depository bank, a valid contract executed in pursuance of the statutes of Georgia.

Prior to the Amendment of June 25, 1930, a national bank could *not legally* pledge assets to secure funds of a State.

Marion vs. Sneeden, *supra.*

This amendment was not declaratory of the rights of national banks already existing, nor was it intended as remedial legislation. In no sense could it be defined as a curative statute.

Marion vs. Sneeden, *supra.*
Texas & P. Ry. Co. vs. Pottorff, 78 L. Ed. 514, Advance Opinions, October Term, 1933, No. 7.

Respondent cites as authority for its contention that the Act of June 25, 1930, had the effect, upon the acceptance by the bank of State deposits, of a re-execution of the depository bond of July 12, 1928, the case of Jones vs. New York Guaranty Company, 101 U. S. 622, 25 L. Ed. 1030. As we read this case, it has no application here, for the reason that the debtor corporation in that case *had the express charter power to execute the mortgage,* whereas, in this case *the bank had no power in 1928* to give any form of security for the deposit of State funds.

The contention is made on page ten (10) of the Respondent's brief that Section 137, Title 12, U. S. C. A., provides for a lien similar to that given by the Georgia statute. These statutes differ substantially. In this connection it may be noted that Section 101, Title 12, U. S. C. A. provides for the issuance of national bank notes in an amount

equal to the par value of United States *bonds deposited with the Treasurer of the United States to secure such notes*, and requires that the security be ample at all times. The lien given by Section 137, Title 12, U. S. C. A., attaches to the bank's assets *only* in the event of a deficiency after the sale of such bonds and to the extent of such deficiency (a remote contingency), whereas the lien of the Georgia statute attaches upon all of the property of the bank, from the date of the depository bond, for the full amount of the depository bond, there being no pledged assets to respond in the first instance. The fact that the National Bank Act gives no lien even for debts due the United States, except in this one instance as *secondary* security for the bank's circulating notes, obligations of the highest dignity, indicates that Congress did not intend to grant a national bank power to give a greater right through the lien provided by the Georgia statute. Cook County National Bank v. United States, 107 U. S. 445.

It is pointed out on page 12 of the Respondent's brief, that this honorable Court held in United States vs. Butterworth-Judson Corporation, 267 U. S. 387, that a lien is within the meaning of the word "security", but we submit that this construction has no application to the term "security" as used in the National Bank Act.

In the Butterworth case, the United States advanced certain sums to the Corporation, under a war-time act, for the purpose of constructing a plant for the manufacture of picric acid. The agreement provided (to the knowledge of the bank), that advances of money under the statute would be carried as special deposits and that the Government would be entitled to unexpended balances. The effect was to create an equitable assignment of the special deposit as security for the repayment of the advances. The right of a bank having knowledge of the special character of the deposit and of the relationship between the parties to set-off the deposit against a debt due it from the corporation, despite the adverse claim of the United States, was denied.

While security for a debt may consist of an equitable lien, the question in the instant case is whether Congress intended by the Act of 1930 to authorize a national bank to give a lien on *all* of its assets to secure a public deposit. In the Butterworth case the contractor possessed *full power* to give the lien, whereas the City of Marion case decides that a national bank has *no inherent or implied power* to give security for public deposits of a state; and it is not believed that Congress intended by the Act of 1930 that a national bank should tie up its *entire* assets to secure a deposit of a state, to the detriment of all of the other depositors including the United States, if it happened to be a depositor, and its collateral proved to be inadequate. Certainly such a wide departure from customary practice should require specific language to this effect and not mere implication.

The statement on page 27 of the Respondent's brief that a national bank cannot become a depository of the State of Georgia if it can not give the lien provided by the State statute is answered on page 19 of the Petitioner's brief where it appears that under the law of Georgia since 1893 a national bank may qualify as a State depository by depositing with the State Treasurer United States bonds or Georgia State bonds.

On page 30 of its brief Respondent contends that Congress has recognized the right to take as security for public deposits something other than a pledge of a bank's assets, by the use of the term "otherwise" in Section 90, Title 12, U. S. C. A. In Vol. 16 Opinions Attorney General page 96 this term was interpreted as authorizing money securities of the United States of the same general character as its bonds, and as permitting the Secretary, in consequence, to accept Treasury notes of the United States in lieu of other securities. Inquiry at the Division of Deposits, Treasury Department, reveals that by regulation all deposits of public funds under the cognizance of that Department are se-

cured by *specific pledges of assets* and no instance has been found where anything other than a pledge of a bank's assets is taken to secure deposits of public moneys of the United States, by any Department thereof.

The condemnation of secret pledges of assets to secure public deposits, discussed on pages 30 and 31 of the Respondent's brief, is inapplicable to national banks, as the published condition reports now required under Section 5211, U. S. R. S., must reflect all pledges of the bank's assets to secure circulating notes, deposits of the United States, States or their political subdivisions and all other deposits including funds of the trust department deposited in the commercial department. (See excerpt from report, Appendix p. 17). It will be noted that no instruction is embodied requiring report of liens of the character provided by the Georgia statute here involved.

The intent of Congress to place national banks upon an equal competitive basis with state banks is apparent from many of the amendments to the National Bank Act. The Georgia statute (Section 1256, Code of Georgia, Petitioner's brief page 27) discriminates against national banks in that the amount of the bond required is double that provided by the statute for a state bank. Hence, it can not be presumed that Congress intended such a State statute to be made applicable to a national bank under the Act of Congress of June 25, 1930.

Section 91, Title 12, U. S. C. A. (a section of the National Bank Act), provides in part that: "* * * and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court". The Georgia statute (Section 224, Park's Code, Georgia—1914) provides that in the event of a default by the State Treasurer "the Governor may issue a fi fa instanter against the Treasurer *and his securities* for the amount due the State by the Treasurer with penalties and

costs; said fi fa to be directed to all and singular the sheriffs of said State". Colquitt, Gov., vs. Simpson & Ledbetter, 72 Ga. 501, holds that this provision applies to depository banks and their sureties. Certainly it can not be presumed that in passing the amendment of June 25, 1930, Congress intended to waive this protection extended national banks by Section 91 *supra*, and allow summary statutes such as the Georgia Statute to apply to national banks, instrumentalities of the Federal Government, and thus permit the Governor of the State to control not only the operations but the very existence of a national bank where the national bank resists the claims of the State for the alleged deposit.

In its opinion the court below adopted the conclusion reached by the United States District Court in the case of In Re Blalock, 31 F. (2) 612. In that case the Bank of Fayetteville, a State depository, became bankrupt and the State claimed a lien by virtue of a depository bond, as of the date of the bond. The bank had pledged assets to a correspondent bank as security for loans and the State claimed that its lien extended to the pledged collateral. The Court held that "the extent of the intent of the Legislature was that the county should have a lien upon the assets or property in the hands of the bank at the time of its insolvency." This holding places the lien within the prohibition of Davis v. Elmira Savings Bank, 161 U. S. 275. The Blalock opinion ignored or overlooked Simpson v. Mathis, 79 Ga. 159 (holding the lien attached prior to suspension), and Colquitt, Gov., v. Simpson, 72 Ga. 501, to the same effect. The Blalock opinion seems, in this respect, inconsistent with the opinion of the court below in the present case.

STATE'S LIEN AS CONSTRUED BY THE SUPREME COURT OF GEORGIA.

Respondent asserts that there is no difference between the construction placed upon Sections 1252 and 218 of the Code of Georgia by the Circuit Court of Appeals and by

the Supreme Court of Georgia. (respondent's brief, page 27) and that the construction of the statutes by the Supreme Court of Georgia is that the lien of the State is inferior to the rights of third persons who have received property bona fide prior to insolvency (respondent's brief, page 8). In support of these statements the case of State vs. Brobston, 94 Ga. 95, is cited and quoted from at some length. This case involved the right of a depositor to set-off against his notes due to the bank in the hands of the receiver the amount to his credit in the bank on deposit—the principle decided by this Court in Scott vs. Armstrong, 146 U. S. 493. The right of set-off was recognized by the Code of Georgia at the time of this decision, in 1894, and only the balance remaining due after the right of set-off had been exercised was an asset of the bank.

This case cited with approval Seay et al. vs. Bank of Rome, 66 Ga. 609, 614, in which the Supreme Court of Georgia said:

> "It will thus be seen, that from the day of the execution of the bond by the bank, the state has had a lien upon its property for the sum of fifty thousand dollars. To enforce that lien, under and by virtue of the act creating it, the governor issued the fi. fa. against the Bank of Rome, and we think he had ample authority so to do. Plaintiffs in error contend that the state has no lien on the notes, accounts and choses in action of said bank, because, under our law a judgment fixes no lien on such property, and no levy and sale thereof can be had at law. The reply is, that upon the execution of the bond, the law gave the state a lien upon all the property of the bank; not upon such property only as a judgment would fix a lien upon; not upon such property only as is subject to levy and sale; but upon all the property of the bank. Are not notes and accounts property? Can any reason be given why it is not competent for the legislature to give a lien upon notes and accounts, as well as upon any other property."

In Simpson and Ledbetter vs. Mathis, Sheriff, 79 Ga. 159, the Bank of Rome desiring to become a State depository executed the depository bond required by Section 1252 of the Code of Georgia. Upon this bond one G. C. Samuel became a surety, from whom, while the bank was a going concern and prior to insolvency, Simpson and Ledbetter purchased certain land. The Bank of Rome subsequently defaulting, a writ of execution under the law was issued upon the bond and levied upon the land, which was sold by the sheriff. Whereupon, Simpson and Ledbetter filed their bill against the sheriff, in which they claimed they should be reimbursed for the amount expended in good faith in making permanent improvements on the land, because they did not know at the time of the purchase that the State had any lien upon this property.

The jury found that they were bona fide purchasers without any notice of the existence of the State's lien, but the court decreed that the money in the hands of the sheriff be applied to the execution in favor of the Governor of Georgia, which decree was affirmed by the Supreme Court of Georgia in this language:

> "We think they were bound to know of the existence of this lien; the law created the lien and expressly provided that it should exist, from the time of the execution of the bond, upon all the property of the principal and sureties; and everybody must take notice of this; the law gives them this notice."
>
> Simpson & Ledbetter vs. Mathis, Sheriff, 70 Ga. 159, 161.

The case of Fidelity & Deposit Company vs. Exchange Bank, 100 Ga. 619, cited by respondent in support of its contention that a depository bank can in the ordinary course of business dispose of its assets, freed from the State's lien, has no application whatever to this question, because it deals entirely with the effect of a judgment lien in Georgia. Under the Georgia law a judgment has no lien upon prom-

issory notes in the hands of the defendant, nor are choses in action liable to be seized and sold under execution unless made so specially by statute. (See petitioner's brief, appendix, page 28.)

The Supreme Court of Georgia in Seay et al. vs. Bank of Rome, *supra*, holds flatly that promissory notes and choses in action are by Section 218 and Section 1252 of the Code of Georgia specially made subject to the State's lien on the assets of a depository bank from the date of the execution of the depository bond.

The Supreme Court of Georgia has never construed Code Sections 1252 and 218 in their application to a national bank as a State depository. We submit, however, that the construction placed upon these two sections as applied to state banks, upon the authorities herein cited, gives the State of Georgia a lien upon all the assets of the bank of every character, from the date of the execution of the bond, and that a depository bank cannot alienate its assets freed from the State's lien.

If the Amendment to the National Banking Act of June 25, 1930, authorizes a national bank in Georgia to execute a bond as a depository of State funds, the effect of which is to give the State of Georgia a lien upon all of its assets from the date of the execution of the bond to the amount of the bond, and to prevent the depository bank from disposing of its assets except subject to the State's lien, then the whole plan and purpose of the National Banking Act is destroyed by this amendment.

Respectfully submitted,

SAMUEL H. WILEY,
WALLACE MILLER,
JAS. A. LOWREY, JR.,
JOHN F. ANDERSON,
Attorneys for Petitioner.

F. G. AWALT,
GEORGE P. BARSE,
Attorneys for Comptroller of the Currency.
Of Counsel.

APPENDIX.

FILE No. 2079

No. 12317

THE HANCOCK NATIONAL BANK OF SPARTA
SPARTA, GA.

JOHN C. LEWIS, *Receiver.*

April 29, 1934.

Comptroller of the Currency,
Treasury Department,
Division of Insolvent National Banks,
Washington, D. C.

ATTENTION OF MR. J. F. ANDERSON.

John C. Lewis, Receiver vs.
Fidelity & Deposit Company of Maryland.

Sir:

Pursuant to telephone conversation of even date with Mr. J. F. Anderson, I hand you herewith for your files transcript of account of W. J. Speer and M. L. Ledford, Treasurers of the State of Georgia, as appears from the Individual Ledger Account in the Hancock National Bank. For your information I will say that Mr. Ledford was appointed to succeed Mr. W. J. Speer, deceased. After second thought I decided to prepare a transcript as you indicated that would be sufficient.

You will note that on February 16th, 1927, this account shows there was no balance to the credit of the treasurer and I assume that it is proper to transcribe the account from that date. The next deposit was in the amount of $800.00 and was made on March 10th, 1927 and the account was active from that time up to date of suspension, May 23, 1932. Trusting that this information is what you desire and thanking you for acknowledgement, I am,

Respectfully,

JOHN C. LEWIS,
Receiver.

JCL/w

Sheet No. 4.

THE HANCOCK NATIONAL BANK, SPARTA, GA.
NAME, SPEER, W. J., TREAS.
ADDRESS, STATE OF GEORGIA.
File No. 2079.

Old Balance	Date	Detail Checks in	Date	Deposits	Date	New Balance
			1927			
					Feb. 16	1,645.59
$1,645.59	Feb. 16	1,645.59	Feb. 16		Feb. 16	.00
	Mar. 10		Mar. 10	800.00	Mar. 10	800.00
800.00	Mar. 21	800.00	Mar. 21		Mar. 21	.00
	Apr. 22		Apr. 22	2,830.98	Apr. 22	2,830.98
2,830.98	Apr. 30	2,830.98	Apr. 30		Apr. 30	.00
	Jun. 23		Jun. 23	455.84	Jun. 23	455.84
455.84	Jul. 11	455.84	Jul. 11		Jul. 11	.00
	Sep. 16		Sep. 16	93.24	Sep. 16	93.24
93.24	Sep. 26		Sep. 26	518.98	Sep. 26	612.22
612.22	Nov. 3		Nov. 3	1,200.00	Nov. 3	1,812.22
1,812.22	Nov. 7	1,200.00	Nov. 7		Nov. 7	612.22
612.99	Dec. 6	612.22	Dec. 6		Dec. 6	.00
	Dec. 10		Dec. 10	2,500.00	Dec. 10	2,500.00
2,500.00	Dec. 15	2,500.00	Dec. 15		Dec. 15	.00
			1928			
	Mar. 19		Mar. 19	55.89	Mar. 19	55.89
55.89	Aug. 4		Aug. 4	1,000.00	Aug. 4	1,055.89
1,055.89	Nov. 5	500.00	Nov. 5		Nov. 5	555.89
555.89	Dec. 1		Dec. 1	2,400.00	Dec. 1	2,955.89
2,955.89	Dec. 14	2,000.00	Dec. 14		Dec. 14	955.89
			1929			
955.89	Jan. 2		Jan. 2	7,600.00	Jan. 2	8,555.89
8,555.89	Jan. 4	3,500.00	Jan. 4		Jan. 4	5,055.89
5,055.89	Jan. 16	4,000.00	Jan. 16		Jan. 16	1,055.89
1,055.89	Feb. 12		Feb. 12	500.00	Feb. 12	1,555.89
1,550.89	Apr. 1		Apr. 1	326.70	Apr. 1	1,882.59
1,882.50	May 2	1,000.00	May 2		May 2	882.59
882.59	May 20		May 20	900.00		
			May 20	900.00		
			May 20	2,300.00	May 20	4,982.59
4,982.59	May 30	2,000.00	May 30		May 30	2,982.59
2,982.59	Jun. 12	1,000.00	Jun. 12		Jun. 12	1,982.59
1,982.59	Jul. 1		Jul. 1	323.10	Jul. 1	2,305.69
2,305.69	Aug. 9		Aug. 9	21.24	Aug. 9	2,326.93
2,326.93	Aug. 15	1,000.00	Aug. 15		Aug. 16	1,326.93
1,326.93	Oct. 1		Oct. 1	37.80	Oct. 1	1,364.73
1,364.73	Oct. 7		Oct. 7	100.00	Oct. 7	7,464.73
1,464.73	Nov. 4		Nov. 4	1,100.00	Nov. 4	2,564.73
2,564.73	Nov. 12	1,000.00	Nov. 12		Nov. 12	1,564.73
1,564.73	Dec. 2		Dec. 2	1,500.00	Dec. 2	3,064.73
3,064.73	Dec. 23		Dec. 23	6,600.00	Dec. 23	9,664.73
9,664.73	Dec. 30	5,000.00	Dec. 30		Dec. 30	4,664.73

Old Balance	Date	Detail Checks in	Date	Deposits	Date	New Balance
			1930			
4,664.73	Jan. 2		Jan. 2	4.50	Jan. 2	4,669.23
4,669.23	Jan. 4		Jan. 4	400.00	Jan. 4	5,069.23
5,069.23	Jan. 29		Jan. 29		Jan. 29	3,069.23
3,069.23	Feb. 5	1,000.00	Feb. 5		Feb. 5	2,069.23
2,069.23	Feb. 12	1,000.00	Feb. 12	629.55	Feb. 12	1,698.72
1,698.78	Mar. 1		Mar. 1	800.00	Mar. 1	2,498.78
2,498.78	Mar. 13	1,000.00	Mar. 13		Mar. 13	1,498.78
1,498.78	Mar. 14		Mar. 14	1,145.44	Mar. 14	2,644.22
2,644.22	Apr. 1		Apr. 1	491.31	Apr. 1	3,135.53
3,135.53	Apr. 14		Apr. 14	22.61	Apr. 14	3,158.14
3,158.14	Apr. 30		Apr. 30	1,075.37	Apr. 30	4,233.51
4,233.51	May 15		May 15	1,090.29	May 15	5,323.80
5,323.80	Jun. 7		Jun. 7	433.78	Jun. 7	5,757.58
5,757.58	Jun. 27	1,000.00	Jun. 27		Jun. 27	4,757.58
4,757.58	Jul 1		Jul. 1	9.90	Jul. 1	4,767.48
4,767.48	Jul. 31	2,000.00	Jul. 31		Jul. 31	2,767.48
2,767.48	Oct. 1		Oct. 1	9.00	Oct. 1	2,776.48
2,776.48	Oct. 10		Oct. 10	38.67	Oct. 10	2,815.15
2,815.15	Oct. 15		Oct. 15	246.07	Oct. 15	3,061.22
3,061.22	Nov. 3		Nov. 3	495.69	Nov. 3	3,556.91
3,556.91	Nov. 17		Nov. 17	439.25	Nov. 17	3,996.16
3,996.16	Dec. 1		Dec. 1	954.11	Dec. 1	4,950.27
4,950.27	Dec. 15		Dec. 15	2,202.65	Dec. 15	7,152.92
7,152.92	Dec. 22		Dec. 22	3,825.35	Dec. 22	10,978.27
10,978.27	Dec. 24	2,200.00	Dec. 24		Dec. 24	8,778.27
8,778.27	Dec. 26	3,800.00	Dec. 26		Dec. 26	4,978.27
4,978.27	Dec. 29	2,000.00	Dec. 29		Dec. 29	2,978.27
2,978.27	Dec. 31		Dec. 31	8.10		
			Dec. 31	836.57	Dec. 31	3,822.94
			1931			
3,822.94	Feb. 3		Feb. 3	479.25	Feb. 3	4,302.19
4,302.19	Feb. 16		Feb. 16	490.81	Feb. 16	4,793.00
4,793.00	Feb. 25	2,000.00	Feb. 25		Feb. 25	2,793.00
2,793.00	Mar. 16		Mar. 16	1,252.10	Mar. 16	4,045.10
4,045.10	Apr. 15		Apr 15	898.42	Apr. 15	4,943.52
4,943.52	May 1		May 1	14.40	May 1	4,957.92
4,957.92	May 15		May 15	1,366.87	May 15	6,324.79
6,324.79	May 26	1,500.00	May 26		May 26	4,824.79
4,824.79	Jun. 1		Jun 1	14.00		
			June 1	270.01	Jun. 1	5.108.80
5,108.80	Jun. 9	200.00	Jun. 9		Jun. 9	4,908.89
4,908.80	Jul. 14		Jul. 14	895.96	Jul. 14	5,804.76
5,804.76	Jul. 24	900.00	Jul. 24		Jul. 24	4,904.76
4,905.76	Jul. 25		Jul. 25	43.97	Jul. 25	4,948.73
4,948.73	Jul. 27	43.97	Jul. 27		Jul. 27	4.904.76
4,904.76	Oct. 1		Oct. 1	59.40	Oct. 1	4,964.16
4,964.16	Nov. 2		Nov. 2	114.88	Nov. 2	5,079.04
5,079.04	Nov. 16		Nov. 16	439.91	Nov. 16	5,518.95
5,518.95	Dec. 2		Dec. 2	363.41	Dec. 2	5,882.36
5,882.36	Dec. 15		Dec. 15	1,365.02	Dec. 15	7,247.38
7,247.38	Dec. 22		Dec. 22	3,233.75	Dec. 22	10,481.13
10,481.13	Dec. 28	3,00.00	Dec. 28		Dec. 28	5,481.13
		2,000.00			Dec. 28	5,481.13

Old Balance	Date	Detail Checks in	Date	Deposits	Date	New Balance
			1932			
5,481.13	Jan. 4		Jan. 4	50.40		
			Jan. 4	1,128.91	Jan. 4	6,660.44
6,660.44	Feb. 1		Feb. 1	153.00		
			Feb. 1	420.91	Feb. 1	7,234.35
7,234.35	Mar. 1		Mar. 1	31.50		
			Mar. 1	398.42	Mar. 1	7,664.27
7,664.27	Mar. 16	2,000.00	Mar. 16		Mar. 16	5,664.27
5,664.27	Apr. 2		Apr. 2	370.10		
			Apr. 2	707.45	Apr. 2	6,741.82
6,741.82	Apr. 9	2,000.00	Apr. 9		Apr. 9	4,741.82
4,741.82	May 3		May 3	765.88	May 3	5,507.70
5,507.70	May 16		May 16	649.71	May 16	6,157.41

MEMORANDUM: LOANS AND INVESTMENTS PLEDGED TO SECURE LIABILITIES.

31. United States Government securities							31
32. Other bonds, stocks, and securities							32
33. Loans and discounts							33
34. TOTAL PLEDGED (excluding rediscounts)							34
35 Pledged:							35
(a) Against circulating notes outstandng							(a)
(b) Against United States Government and postal savings deposits							(b)
(c) Against public funds of States, counties, school districts, or other subdivisions or municipalities							(c)
(d) Against deposits of trust department							(d)
(e) Against other deposits							(e)
(f) Against borrowings							(f)
(g) With State authorities to qualify for the exercise of fiduciary powers							(g)
(h) For other purposes							(h)
(i) TOTAL PLEDGED (must agree with Item 34)							(i)

JOHN C. LEWIS, as Executor of the HANCOCK NATIONAL BANK OF SPARTA, GA.,

Petitioner,

versus

FIDELITY & DEPOSIT CO. OF MARYLAND,

Respondent.

BRIEF OF RESPONDENT

ARTHUR C. POWELL,
CHAS. H. REID,
MAX F. GOLDSTEIN,
Solicitors for Respondent.

Atlanta, Ga.

INDEX

TABLE OF CONTENTS

	Page No.
JURISDICTION	1
STATEMENT OF CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. The Courts Take Judicial Notice of the Time When Public Officials Held Office	6
II. The Lien Is Valid Under Any Construction	7
III. This Court Will Accept the Construction Placed Upon the Statute by the Courts of Georgia	7
IV. The Georgia Lien Comes Within the Letter and Spirit of the Amendment of June 25, 1930	11
V. The State of Georgia Had the Benefit of the Amendment of June 25, 1930, Without the Execution of a New Depository Bond	15
VI. It Is Not Necessary That the Manner in Which a National Bank Gives Security Shall Be Uniform in Each State	18
VII. National Banks Have at All Times Possessed the Power to Qualify as State Depositories Under Their Incidental Powers	19
VIII. When State Funds Are Placed in a Designated Depository the Right to Give Security Exists Directly and by Implication	21
IX. The Lien Is Not *Ultra Vires*	21
X. The Giving of Security (Other Than a Pledge of Secondary Reserves) Is Within the Power of National Banks Receiving Deposits of State Taxes Where the Law Requires Such Security	23

TABLE OF CASES

	Page No.
Abilene Nat'l Bank v. Doldez, 179 Fed. 461; 218 U. S. 673; 54 Law Ed. 1205	37
Allen v. U. S., 285 Fed. 678 (Footnote 2)	2
American Surety Co. v. Philippine Nat'l Bank, 166 N. E. 634	31
Anchor Oil Co. v. Gray, 256 U. S. 516; 65 Law Ed. 68	17
(The) Apelon 22 U. S. 9 (Wheat) 362; 6 Law Ed 111	6
Blalock, 31 Fed. (2nd) 612	9
Board of Comm. v. Strawn, 157 Fed. 49; 15 ALR N. W. 1100	2
Brown v. Spillman, 155 U. S. 655; 15 Sup. Crt. 245; 39 Law Ed. 304	6
Brown v. Piper, 91 U. S. 37; 23 Law Ed. 200	7
Brown v. Schiller, 118 Fed. 981	26
Brown v. Walker, 161 U. S. 591; 40 Law Ed. 819	11
Burroughs v. U. S., No. 431	23
Cathcart v. Robinson, 5 Peters 264; 8 Law Ed. 120	11
Capital Traction Co. v. Hoffman, 174 U. S. 1; 43 Law Ed. 873	11
Carcaba v. McNair, 68 Fed. (2nd) 795	20
Charlotte Harbor & Northern R. R. Co. v. Wells Comm., 260 U. S. 8; 67 Law Ed. 100	16
Chattahoochee Nat'l Bank v. Schley, 58 Ga. 369; 7 C. J., §751	20
City of Little Rock v. Merchants Nat'l Bank, 98 U. S. 308; 25 Law Ed. 108	16
City of Marion v. Sneeden, No. 400	21, 30
Clement National Bank v. Vermont, 231 U. S. 120; 58 Law Ed. 147	26, 28
Cooper v. Hill, 94 Fed. 582	26
Davis v. Elmira Savings Bank, 161 U. S. 275; 40 Law Ed. 700	32, 35

TABLE OF CASES—(Cont'd)

	Page No.
Earl v. Pa., 178 U. S. 449; 44 Law Ed. 1146	25
Ewell v. Daggs, 108 U. S. 143; 27 Law Ed. 682	16
Fidelity & Deposit Co. v. Exchange Bank, 100 Ga. 619	9
Fidelity & Deposit Co. v. Kokrda, Receiver, 66 Fed. (2) 641	11
First Nat'l Bank of Selma v. Colby, 88 U. S. 609; 22 Law Ed. 687	10
First Nat'l Bank v. Anderson, 269 U. S. 341; 70 Law Ed. 295	18
First National Bank of Carlisle (Pa.) v. Graham, 100 U. S. 680; 25 Law Ed. 750	20
First Nat'l Bank v. Fellows, 244 U. S. 417; 61 Law Ed. 1233, LRA 1919-C, 283	20
First Nat'l Bank v. National Exchange Bank, 92 U. S. 122; 23 Law Ed. 679	26
First Nat'l Bank of Aiken v. Mott Iron Works, 215 U. S. 240; 66 Law Ed. 593	31
Grigsby v. Peoples Bank, 158 Tenn.; 11 S. W. (2nd) 673	31
Gulf Refining Co. v. U. S., 269 U. S. 125; 70 Law Ed. 195	3
Hancock County v. Hancock Nat'l Bank, 67 Fed. (2nd) 421	2, 21
Hartford Acc. & Ind. Co. v. Nelson, 78 Law Ed. 470	7
Hazeltin v. Central Bank of Springfield, No. 1, 183 U. S. 130	3
Holden v. Stratten, 198 U. S. 200; 49 Law Ed. 1018	18
House Report, 1657, 71st Congress, 2nd Session	22
Interstate Commerce Comm. v. Delaware, etc., R. R., 220 U. S. 235; 55 Law Ed. 448	15
Josey v. Brown, 119 Ga. 758; 47 S. E. 350	6
Jones v. New York, etc., Guaranty Co., 101 U. S. 622; 25 Law Ed. 1030	15
Jefferson City Gas Light Co. v. Freeman Clark and City of New Orleans, 95 U. S. 644; 5 Otto; 24 Law Ed. 521	17
Ketchum v. City of St. Louis, 101 U. S. 306; 25 Law Ed. 999	37

TABLE OF CASES—(Cont'd)

	Page No.
Louisiana Navigation v. Oyster Comm., 226 U. S. 99	3
Lehman v. Gumbell Co., 236 U. S. 448; 59 Law Ed. 666	18
Luther Williams Bank & Trust Co. case, 166 S. E. 260; 45 Ga. App. 831	33
McComb County Comm. Knox County, 91 U. S. 1; 23 Law Ed. 185	3
Merrill v. National Bank of Jacksonville, 173 U. S. 147	35
Mothersead v. U. S. F. & G. Co., 22 Fed. (2nd) 644; CCA 8, 1927	35
National Bank v. Graham, 100 U. S. 699	23
National Bank v. Insurance Co., 104 U. S. 54; 26 Law Ed. 693 (Footnote 2)	2
Noble State Bank v. Haskell, 219 U. S. 105; 55 Law Ed.	37
People of N. Y. v. McClay, 228 U. S. 290; 77 Law Ed. 754 (Note 5)	28
Pickering v. Lomax, 145 U. S. 310	17
Pottorf, Receiver, v. El Paso, etc., 62 Fed. (2nd) 498	29, 35, 37
Pottorf, Receiver, v. Underwriters of Lloyds, 298 U. S. 724	36
Producers Naval Stores Co. v. McAllister, 278 Fed. 13-17	16
Ragland v. Barringer, 44 Ga. 114	6
Read v. Plattsmouth, 107 U. S. 568	16
Remington, §1291, *et seq.*	18
Remington, §1294, note 72	18
Richards v. McChestney, 218 U. S. 492; 54 Law Ed. 1122	6
Rose's Notes, 1932 Supplement, Vol. 4, p. 286	17
Scott v. Armstrong, 146 U. S. 499; 510; 36 Law Ed. 1059	25, 31, 34
Scharnick v. Butler, 185 N. E. 111	31
Schlosser v. Hemphill, 198 U. S. 173	3

TABLE OF CASES—(Cont'd)

	Page No.
State v. Brobston, 94 Ga. 95	8
State of Nebraska v. First Nat'l Bank of Orleans, 88 Fed. 947	19, 36
Sumner v. Hicks, 2 Black 532; 67 U. S. 735	15
Supervisors v. Wisc. Central R. R. Co., 121 Mass. 460	16
Supreme Lodge K. P. v. Meyers, 265 U. S. 30; 68 Law Ed. 885	8
Texas & Pac. R. R. v. Pottorf, 63 Fed. (2nd) 3	21
Theleusorf v. Smith, 2 Wheat 396; 4 Law Ed. 271 (note 5)	28
Thornton v. Comer, 80 Ga. 397	10
Trustees First Presbyterian Church v. National State Bank, 57 N. J. Law 27, 29 A. 320; 36 Atl. 1129	26
Turner Const Co. v. Union Terminal Co., 279 Fed. 702	16
Twin City Co. v. Hardin Glass Co., 283 U. S. 353	19
U. S. v. Butterworth-Judkins Co., 267 U. S. 387; 69 Law Ed. 672	12
U. S. v. Catts, 271 U. S. 354; 70 Law Ed. 986	11
U. S. v. Heinzen, 206 U. S. 370; 51 Law Ed. 1098; 27 Sup. Court, 742	16
U. S. v. Babbit, 1 Black, 55	23
U. S. v. LeBris, 121 U. S. 278; 30 Law Ed. 946	14
Watts v. Board of Comm., 95 Pac. 771	2
Weeks v. International Trust Co., 125 Fed. Rep. 370	26
Western National Bank v. Armstrong, 152 U. S. 346; 38 Law Ed. 470	26
Willis v. Eastern Trust & Banking Co., 169 U. S. 295; 42 Law Ed. 752	14
Wyman v. Wallace, 201 U. S. 230	27
Zeigler v. Ill. Trust & Savings Bank, 245 (Ill.) 180 (1910), 193	22

TABLE OF STATUTES CITED

	Page No.
CODE OF GEORGIA:	
Park's Code 1914, §§1241-1245	9
Park's Code, §§1252-1254-1256	21
Georgia Code, §§3329-3340-3334	25
Georgia Code, §§3339-3352	25
Georgia Code, §§3330-5432-5946	25
Corpus Juris, Vol. 59, §459	13
UNITED STATES CODE:	
U. S. C. A., 237	1
28 U. S. C., §344	1
U. S. C. A., Title 12; 90-91	30
12 U. S. C. A., §137	10
U. S. C. A., Title 12; 194	25
U. S. C. A., Title 12, §24 (3, 7)	25
U. S. C. A., Title 12, §29	25
U. S. C. (12), §24 (7)	27
U. S. C. A., Title 12; §24 (3)	26

IN THE,

Supreme Court of the United States

No. 802

JOHN C. LEWIS, as Receiver of the HANCOCK NATIONAL BANK OF SPARTA, GA.,

Petitioner,

versus

FIDELITY & DEPOSIT CO. OF MARYLAND,

Respondent.

JURISDICTION

It is doubtful whether this Court has jurisdiction because the judgment lacks the requisite finality (Judicial Code §237—28 U. S. C. §344). Whatever may have been the situation when the petition for certiorari was considered by the Court, it now appears from the brief of petitioner (p.17), that he brings into question the time of the deposits involved in this cause and whether they were prior or subsequent to June 25, 1930.

The Circuit Court of Appeals did not render a final judgment in the case. It reversed the action of the District Court and ordered: "That this cause be and is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this court" (tr. p. 35). As we

shall presently show, M. L. Ledford did not become Treasurer until after December 16, 1931,[1] and if the Court takes judicial cognizance of this and accepts as a fact that the taxes involved were deposits made after Ledford became Treasurer, then a proper construction of the order assailed would give it finality, but if either the date or the character of the deposit is involved, then issues may arise in the trial court either on the present pleadings or amendments that may properly be filed. The respondent may also supplement its pleadings by alleging that if the Hancock National Bank qualified as a depository at a time when it lacked the corporate power to do so, then the acceptance of the public deposit was illegal and a trust relationship followed. It would then be pertinent for the lower court to settle the pleadings and inquire whether the funds coming to the Receiver from the closed bank were subject to the trust.[2]

That this Court has ordinarily no jurisdiction when the

Note 1. W. J. Speer, State Treasurer, died December 30, 1931. At his death he was Treasurer of Georgia. New York Times Index 1932. News Account appears p. 19, December 30, 1931.

W. J. Speer was Treasurer 1911 to 1931—Georgia Official and Statistical Register (published biennially by the Georgia Department of Archives and History) 1931 Vol. p. 53. M. L. Ledford succeeded Speer as Treasurer—Georgia Official and Statistical Register, 1933 Edition.

Note 2. A state officer may not lawfully deposit the money of the state in a bank that is not an authorized and qualified depository. Compare *Hancock County, et al.* v. *Hancock National Bank of Sparta*, 67 Fed. (2nd) 421-422.

Money may be traced and a lien fixed upon the assets of an unauthorized depository. *Allen* v. *U. S.*, 285 Fed. 678. *Board of Commissioners* v. *Strawn*, 157 Fed. 19; 15 LRA New Series, 1100, and other cases cited in the *Hancock County case*, supra.

A deposit made by a county treasurer in a bank not qualified as a depository, was traced as a trust fund in a closed national bank.

Watts v. *Board of Commissioners* (Okla.), 95 Pac. 771.
National Bank v. *Insurance Co.*, 104 U. S. 54; 26 Law Ed. 693.

judgment and order appealed from is reversed and the cause remanded for further proceedings not inconsistent with the opinion of the Court, is not open to question.

Haseltin v. *Central Bank of Springfield No.* 1, 183 U. S. 130:

> "We have frequently held that a judgment reversing that of the court below and remanding the case for further proceedings, is not one to which a writ of error will lie * * * while the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. * * * It may happen that the defeated party "may amend his pleading by supplying some discovered defect. * * * To determine whether, in a particular case, this may or may not be done, might involve an examination not only of the record but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court which might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality and refused to inquire whether in the case of a new trial, the defeated party would stand in position to make a better case."

To the same effect are other cases, both prior and subsequent to the Haseltin case.

McComb v. *County Commissioners, Knox County*, 91 U. S. 1; 23 Law Ed. 185.
Schlosser v. *Hemphill*, 198 U. S. 173-175.
Louisiana Navigation v. *Oyster Comm.*, 226 U. S. 99-101.
Gulf Rfg. Co. v. *United States*, 269 U. S. 125; 70 Law Ed. 195.

STATEMENT OF CASE

The sole question for decision is whether the Georgia statutory policy fixing liens upon the property of its

depositories for the repayment of taxes deposited is valid and enforceable against national banks and the Comptroller of the Currency. The statement in plaintiff's brief (pp. 2-5) is reasonably accurate but the following additional fact should be added: The tax funds involved were deposited not earlier than December 30, 1931, and not later than May 28, 1932. These dates appear because M. L. Ledford did not become Treasurer until on or after December 30, 1931, and the bank failed May 23, 1932. Wm. J. Speer was Treasurer of Georgia from 1911 to December 30, 1931. Ledford was his successor.

SUMMARY OF ARGUMENT

I. This Court will readily look to public sources in determining the date when Ledford became Treasurer of the State of Georgia, in order to determine whether the deposit was made prior to or after the adoption of the June 25, 1930, amendment, and from the information thus obtained, will find that Ledford became Treasurer after the amendment was adopted.

II. The lien prescribed by the Georgia statute is valid under any construction that may be given to the opinion of the Circuit Court of Appeals. We contend that the opinion correctly states the Georgia law. In any event, the construction given to it by the federal court is narrower than the construction given by the state court, and error cannot be assigned upon a construction not involved in this case.

III. This Court will accept the construction placed upon the statute by the courts of Georgia, and as so limited, the statute does not come in conflict with the National Banking Act.

IV. The lien created by the laws of Georgia is included within the letter and spirit of the June 25, 1930, amendment. The language of the amendment is comprehensive and covers all kinds and manner of security authorized by the laws of the state in which the national bank is located.

V. The State of Georgia had the benefit of the 1930 amendment because its deposits were made after that date, even though the bank became a depository prior to that time. The lien being created by law and not by the bond, it was unnecessary to execute a new bond. After the adoption of the amendment all deposits had the benefit of it.

VI. The manner of the security prevailing in Georgia was not necessarily the same as the security provided for in some other states. There is no provision in the Congressional Act requiring uniformity of security.

VII. National banks have at all times possessed the power to qualify as state depositories under their incidental powers. The state demanded the security as a condition to making the deposit. National banks, in competition with state banks, should receive their proportion of state funds as deposits. The right of the state to demand security implies the incidental power of the qualifying bank to give security providing the manner and form of said security does not prevent the bank from discharging its legitimate functions under the law.

VIII. The Georgia laws properly construed require security as a condition to receiving a state deposit and consequently the correlative liability to give security exists.

IX. The Georgia lien is not *ultra vires*. The practice of placing state deposits in national banks had been questioned in 1928, because of certain decision in Minnesota. National banks faced the loss of state deposits. With these facts before it, Congress passed the amendment under discussion and it was for Congress to determine the means necessary to attain the desired end. It did so by using broad and comprehensive language permitting national banks to give the same security as could be given by the corresponding state banks.

X. This Court has held that the pledge of secondary reserves was inconsistent with good banking practice. It has

not held that where the state laws provided for a general lien of a type which would not interfere with the normal business of the bank, such lien could not exist in favor of the state even prior to June 25, 1930.

ARGUMENT

I.

THE COURTS TAKE JUDICIAL NOTICE OF THE TIME WHEN PUBLIC OFFICIALS HELD OFFICE.

Josey v. *Brown*, 119 Ga. 758; 47 S. E. 350.

"* * * of a governor's proclamation."

Ragland v. *Barringer*, 44 Ga. 114.

The foregoing applied to the judicial notice taken by the trial judge. This Court will take judicial notice.

"* * * and this Court is bound to take notice of public facts * * * public documents."

The Apelon, 22 U. S. (9 Wheat) 362; 6 Law Ed. 111.

"We may take judicial notice that the defendant, McChestney, is no longer secretary of the Commonwealth of Kentucky, his term having expired and his successor having been inducted into office."

Richards v. *McChestney*, 218 U. S. 492; 54 Law Ed. 1122.

"* * * and of public activities within the jurisdiction and more especially of public conferences and meetings of members of the community of common interest and wide concern of which the court ought to have known."

Brown v. *Spillman*, 155 U. S. 665-670; 15 Supreme Court 245; 39 Law Ed. 304.

"* * * and if the judge's memory is at fault, he may

resort to means he may deem safe to refresh his memory."

Brown v. *Piper*, 91 U. S. 37; 23 Law Ed. 200.

II.

THE LIEN IS VALID UNDER ANY CONSTRUCTION.

We accept the premise advanced by petitioner (petitioner's brief, p. 7) that this case involves the validity of the Georgia depository statute as applied to national banks and the power of national banks to give the statutory lien viewed in the light of the amendment of June 25, 1930, and the general powers of a national bank.

There is no difference between the construction given the statute by the Circuit Court of Appeals and the construction given by the Supreme Court of Georgia. The Circuit Court of Appeals correctly summarized the construction given the relevant state statutes by the Supreme Court of Georgia, and its Court of Appeals, as is fully set out in its opinion. (Tr. pp. 20-24 inc.). The lien binds and affects the property of the bank from the date of the bond.

> "It is true that the lien seldom needs assertion unless insolvency occurs but that is true of all security." (Opinion of Judge Sibley, p. 25.)

III.

THIS COURT WILL ACCEPT THE CONSTRUCTION PLACED UPON THE STATUTE BY THE COURTS OF GEORGIA.

Hartford Accident & Indemnity Co. v. *Nelson*, 78 Law Ed. 470, *decided by this Court February* 5, 1934, No. 239:

> "'The Supreme Court of the United States is bound by the construction given to a state statute by the "highest court of the state."'"

> "As to the meaning of the statute now challenged as invalid, the Supreme Court of Mississippi speaks with ultimate authority."
>
> *Supreme Lodge K. P.* v. *Meyer*, 265 U. S. 30-32; 68 Law Ed. 885-887.
>
> *Hartford case, supra.*

The construction of the statute by the Supreme Court is that the lien of the state is inferior to the rights of third persons who have received propery *bona fide* prior to insolvency and even inferior to the rights of depositors themselves to offset the bank's indebtedness against the obligation of the depositors.

In *State* v. *Brobston*, 94 Ga. 95, it was held:

> "Where a bank which is a state depository becomes insolvent while indebted to the state, and its effects are in the hands of a receiver, depositors in the bank who are also indebted to it by promissory notes have the right to set off against such notes in the hands of the receiver, the amounts justly due them respectively on their deposits. Such notes are assets of the bank upon which the state's lien takes effect only insofar as there may be balances due to the bank thereon after deducting the amounts of the respective deposits made *bona fide* while the bank did business and its effects were under its own control."

That case involved the exact question whether the first lien on all the assets of the state was an absolute lien binding from the date of its inception, or whether it should be given the construction contended for by Judge Sibley. The Court recognizing that there was but one question for its consideration, affirmed the action of the trial judge who had directed the receiver to "disregard the claims set up by the State of Georgia for a prior lien upon the papers of said bank to the exclusion of the depositors of said bank, to offset upon said papers in the hands of said bank whatever amount

there may have been to their credit at the date of the closing of said bank."

The construction above contended for has been adopted by the federal courts in Georgia in Hancock Bank case. (This case 67 Fed. (2) 961).

In re: *Blalock*, 31 Fed. (2nd), 612.

The State of Georgia and its subdivisions have for many years been entitled to a lien upon the property of persons or corporations who held public funds.

Compare *Parks' Code*, 1914, §1241 and §1245, quoted by Judge Barrett in the Blalock case, *supra*, p. 613, as follows:

> "While there might, in the absence of other legislation, be doubt as to giving this effect to such language, we find a legislative declaration to the effect that the language in the statute is equivalent to the declaration of a lien. In the Acts of the General Assembly of 1890-91, p. 101 (embodied in sections 1241 through 1245 Park's Code of Georgia of 1914), it is declared in section 1244: 'Nothing in preceding three sections shall be construed to affect the validity or force of the lien of any such bond from the date thereof as between the parties thereto.' The bonds in question are those of 'county treasurers', 'tax collectors', and 'tax receivers.'"

The opinions of Judge Sibley and Judge Barrett as to alienability of bank securities despite the existence of the lien is not some newborn, unheard of thing they have imported into the Georgia law, as opposing counsel seem to think. It was clearly explained by Judge Atkinson, in *Fidelity & Deposit Co.* v *Exchange Bank*, 100 Ga. 619, that the nature of a lien on certain classes of property such as negotiable paper and choses in action, is that it attaches only "in a general sense" from the date of accrual though not

"in the special sense which prevents alienation," but that it will be given full rank and effect from date of accrual in any court or administrative distribution of the proceeds of such property if it has not been previously alienated. The construction contended for by petitioner, that the lien would destroy alienability, was considered by the Court in that case and rejected:

> "It is manifest that no such intention ever entered the legislative mind."
> *Fidelity & Deposit Co. case*, supra, p. 625.

See also *Thornton* v. *Comer*, 80 Ga. 397.

The placing of a lien of the type provided for in the laws of Georgia, does not prevent a bank from discharging its normal functions. (Opinion of Judge Sibley, tr. pp. 23-25).

An analogy may be found in the liens provided for by federal statutes.

In: *First National Bank of Selma* v. *Colby*, 88 U. S. 609; 22 Law Ed. 687, this Court discusses (*Act June* 3, 1864, 13th *Statute at Large* 99, now 12 U. S. C. A. §137) and points out:

> "To make good any deficiency which may exist in the proceeds of the bonds to meet the amount expended in paying the notes of a bank, the Act declares that the United States shall have a first and paramount lien upon all the assets of the association. Whatever disposition therefore may be made of the property of an insolvent bank, the lien of the United States thereon must exist until the government is fully reimbursed."

The lien above referred to differs in no material respect from the Georgia lien except that it is paramount. It is not seriously suggested that the presence of this lien against the assets of every national bank in anywise interferes

with the normal and complete discharge of its banking functions. The liens in favor of the United States, as well as the Georgia statutes, have been and should be given a sensible construction consistent with the legislative purpose. *U. S.* v. *Catts*, 271 U. S. 354; 70 Law Ed. 986-988.

IV.

THE GEORGIA LIEN COMES WITHIN THE LETTER AND SPIRIT OF THE AMENDMENT OF JUNE 25, 1930.

This amendment provides:

> "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

It is contended by petitioner (brief p. 20), that: "Congress meant the pledging or depositing with the state of specific property of the form and character required of state banks by state law, or the giving of a security bond free of any liens incident that may be declared by state law to attach thereto." We contend that neither the language of the amendment, nor any inference properly drawn therefrom, supports this contention.

The amendment was construed by the Circuit Court of Appeals, Tenth Circuit, in *Fidelity & Deposit Co.* v. *Kokrda*, Receiver, 66 Fed. (2nd) 641, and received the broad and reasonable construction contended for here. That Court held:

> "(Headnote1.) National bank is authorized to give same kind of security for public deposit as state banks in same state, and state law determines procedure required in giving security.";

As pointed out in that case, page 642:

> "§90, *supra*, does not say a national bank may give security in the same *manner*, but that it may give security of the same kind as the state bank may give. Kind means: class, character, sort, description. Had Congress intended to limit the manner of giving security we think it would have said 'of the same kind and in the same manner', or used words of equivalent import. The plain purpose of the statute was to remove any doubt of the power of national banks to give security for public deposits and in that respect to enable them to invite public deposits on equal footing with state banks. It is our opinion that it authorized a national bank to give the same kind of security for public deposits as state banks are authorized to give, in a state in which such national banks are situated and leave to state law the question of the procedure to be followed in the giving of such security."

The word "security" is broader than the word "pledge". Indeed, "security" has by this Court been defined to include a lien upon money in bank, the holding of this Court being: "A lien is clearly within the meaning of the word 'security' as used in the Act."

> *United States* v. *Butterworth-Judkins Co.*, 267 U. S. 387; 69 Law Ed. 672.

Reference to standard works give the following definitions of "security":

> "Property given or serving to render secure the enjoyment or enforcement of a right."—*Webster's New International Dictionary.*
>
> "That which makes the enforcement of promise more certain than the mere personal obligation of the debtor."—*Ballantine's Law Dictionary.*
>
> "Bail, earnest, guage, pledge, security—the first four

words agree in denoting something given, paid or done. * * * Security may be of real or personal property; anything of sufficient value to make the creditors secure."—*Standard Dictionary.*

"Collateral security is security given for the payment of a debt or the performance of some other act."—*3 Bouvier's Law Dictionary*, pp. 30-32.

"A guaranty or pledge: something given or deposited as surety for the fulfillment of a promise or an obligation."—*Century Dictionary Encyc.*

The broad interpretation for which we contend is further manifested by the words: "of the same kind". "Kind" means "class, sort, description."—*Webster's New International Dictionary.*

"A class, a sort, a species."—*Century Dictionary.*

By authorizing security of the same kind as is authorized by the law of the state, Congress, of necessity, adopted by reference, the entire provisions of the state statute.

In *Corpus Juris*, Vol. 59, §459, the rule is thus stated:

"Reference Statutes, so-called, are not strictly amendatory in their nature and effect, although they adopt by reference merely provisions of other statutes on the same subject, it appearing in more enlarged or extended form, if otherwise complete in themselves. A Reference Act gives a right; declares a duty, or imposes a burden, and adopts existing statutes for the purpose of * * * carrying the provisions of the Reference Act into effect."

"As in authorized by the law of the state", means under any reasonable construction, in compliance with the laws of the state and Congress, in using this language, in effect adopted the law of the state. It is well established that in the construction of foreign statutes, this Court will adopt

the construction made by the courts by whose legislature the statute was enacted.

Cathcart v. *Robinson*, 5 Peters 264; 8 Law Ed. 120.

And the words, when used in the federal statute, should be given the same meaning that they had in the state statute. The effect is the same as if the state statute had actually been enacted as part of the revised statute. In that case the rule would have been:

> "Sections of a statute re-enacted in the revised statutes, are to be given the same meaning they had in the original, unless a contrary intention is clearly manifested."
>
> *U. S.* v. *LeBris*, 121 U. S. 278; 30 Law Ed. 946.

The known and settled construction of the laws by courts of the states from which they are taken are presumed to be adopted with the adoption of the laws.

Brown v. *Walker*, 161 U. S. 591; 40 Law Ed. 819.

> "The adoption by Congress of a state statute includes the adoption of the construction given to it."
>
> *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295; 42 Law Ed. 752.
>
> "Whenever Congress * * * has borrowed from the statutes of states provisions which have received in that state a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded and "the provisions must be construed as they were understood at the time in the state."
>
> *Capital Traction Co.* v. *Hoffman*, 174 U. S. 1; 43 Law Ed. 873.
>
> "The settled construction of the equality clause of

the English Railway Act was accepted by this Court in construing a statute substantially taken from the English statute."

Interstate Commerce Commission, v. *Delaware*, etc. RR Co., 220 U. S. 235; 55 Law Ed. 448.

V.

THE STATE OF GEORGIA HAD THE BENEFIT OF THE AMENDMENT OF JUNE 25, 1930, WITHOUT THE EXECUTION OF A NEW DEPOSITORY BOND.

It appears from events leading up to the adoption of the amendment under discussion, that the Comptroller of the Currency and the Treasurer desired a continuation of the relationship of national banks as state depositories. It is therefore unreasonable to assume that as to future deposits it was first necessary to cancel all public designations and have the national banks designated anew. An analagous case was before this court in *Jones* v. *New York, etc., Guaranty Co.*, 101 U. S. 622; 25 Law Ed. 1030. The original charter of the debtor corporation was granted at a time when the effective statutes prohibited corporations of this kind from mortgaging their property. Subsequently, a mortgage was given to secure further advances at a time when the disabling statute had been repealed. This Court held:

"Where a deed is fatally defective for want of consideration to support it, such consideration subsequently arising may cure the defect and give the instrument validity."

Sumner v. *Hicks*, 2 Black 532; 67 U. S. 735.

"It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon."

It therefore logically follows that if the State of Georgia deposited money in this bank after June 25, 1930, any defect in the power of the bank to qualify originally, or defect in permitting a lien of this type, was removed by the conduct of the parties as the bank possessed the power to give the security.

"A court of equity will not lend its aid in the assertion of a mere legal right contrary to the clear equity and justice of the cause. Equity regards only the substance of things and deals with human affairs upon that principle."

.....*Jones case*, supra.

The adoption (or repeal) of a statute will validate previous pledges or liens.

Supervisors v. *Wisconsin Central RR Co.*, 121 Mass. 460-472.

Producers Naval Stores Co. v. *McAllister*, 278 Fed. 13-17.

Read v. *Plattsmouth*, 107 U. S. 568; 27 Law Ed. 568.

Turner Construction Co. v. *Union Terminal Co.*, 229 Fed. 702.

City of Little Rock v. *Merchants National Bank*, 98 U. S. 308; 25 Law Ed. 108.

Ewell v. *Daggs*, 108 U. S. 143; 27 Law Ed. 682.

"The general and established proposition is that what the Legislature could have authorized, it can ratify, if it can authorize it at the time of ratification." *Charlotte Harbor & Northern R. R. Co.* v. *Wells*, Comm. 260 U. S. 8; 67 Law Ed. 100.

In: *U. S.* v. *Heinzen*, 206 U. S. 370; 51 Law Ed. 1098; 27 Supreme Court 742,

this Court held:

> "What had already been done by an officer although without authority, can subsequently be made legal by a statute thereafter enacted."
>
> "A statute validating a contract of guaranty made by a municipality heretofore without power to execute a guaranty is not a retroactive law and is valid."
>
> *Jefferson City Gas Light Co.* v. *Freeman Clark and City of New Orleans*, 95 U. S. 644; 5 Otto; 24 Law Ed. 521.

Subsequent approval by the President makes valid a deed from an Indian which contained a covenant against alienation without presidential approval.

> *Pickering* v. *Lomax*, 145 U. S. 310-316; 36 Law Ed. 716.

See cases collected in *Rose's notes* 1932 *Supplement*, Vol. 4, p. 286; also *Anchor Oil Co.* v. *Gray*, 256, U. S. 516; 65 Law Ed. 68.

It is clear that Congress could at any time have authorized national banks to place a lien upon their assets for any legitimate purpose. This being true, Congress could and did validate (at least as to all future transactions) all security given by national banks for public deposits in the same manner as the security given by state banks similarly located.

In the *Anchor Oil case*, supra, this Court held in dealing with a lease of oil lands which was not valid until approved:

> "The approval (when given), related back and took effect as of the execution of the lease by the parties named."
>
> 256 U. S. at p. 522.

VI.

IT IS NOT NECESSARY THAT THE MANNER IN WHICH A NATIONAL BANK GIVES SECURITY SHALL BE UNIFORM IN EACH STATE.

This Court has, on numerous occasions, considered this principle in construing analagous statutes. For instance, in taxing national banks.

> "Restrictions on the taxing of national banks not intended to enact mathematical equality nor to do more than to require such practical equality as is reasonably obtainable in view of the differing situations of such properties."
>
> *First National Bank* v. *Anderson*, 269 U. S. 341; at 349; 70 Law Ed. 295.

A federal statute recognizing privileges as provided for by state law does not necessarily operate uniformly throughout the United States. The Bankruptcy Act provides, §6:

> "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition. These exemptions vary in amount and form according to the laws of several states."

Remington §1291, *et seq.*

> "Nevertheless the bankruptcy court is bound by the construction put upon exemption laws by the highest courts of the state in which the bankrupt is "a resident."

Remington §1294—note 72.

> *Holden* v. *Stratten*, 198 U. S. 200; Law Ed. 1018.
> *Lehman* v. *Gumbell Co.*, 236 U. S. 448; 59 Law Ed. 666.

An examination of the statutes of different states in the Union demonstrates that legislative bodies generally recognize that public welfare demands that public funds deposited in banks, be adequately protected and have utilized the power of banks to give securities in various forms for public funds. In at least thirty seven states there are statutes providing that public officials may take some form of security, including a pledge of securities from banks, as distinguished from surety bond for the protection of various types of public funds.[3]

As stated by this Court in *Twin City Co.* v. *Hardin Glass Co.*, 283 U. S. 353-357:

> "Primarily it is for the lawmakers to determine the public policy of the state."

VII.

NATIONAL BANKS HAVE AT ALL TIMES POSSESSED THE POWER TO QUALIFY AS STATE DEPOSITORIES UNDER THEIR INCIDENTAL POWERS.

State of Nebraska v. *First National Bank of Orleans*, 88 Fed. 947:

> "The state through its legislative enactment said to our banks that it desired to place public funds on deposit (not under loan) subject to withdrawal at any time on the order of the Treasurer and at a rate of interest not less than 3% per annum. The defendant bank accepted the deposit on the condition offered * * * whether regarded as a loan or a deposit I do not think it in violation of the authority conferred on a national bank. Certainly the giving of security to do what in law it was obliged to do, was not a void act."

Note 3. See collection of cases 65 *ALR 1398*, and note; 65 *ALR 1412*; also *64 Fed., Note 2, p. 726.*

A bank has no specific power to take special deposits but if it does accept them it is held liable and the act is not deemed *ultra vires*.

First National Bank of Carlisle, Pa., v. *Graham*, 100 U. S. 680; 23 Law Ed. 750.

> "If the bank is accustomed to take such deposits, as are here in question, and this is known to the directors, all liability ensues in like manner as if the deposit had been authorized by the terms of "the charter."

See also: *Chattahoochee National Bank* v. *Schley*, 58 Ga. 339; 7. C. J. §751.

It was the intent of Congress that national banks should discharge their functions so as to meet the legitimate competition of state banks, and the acceptance of the appointment of a state depository for the public funds, is certainly a legitimate exercise of the banking function.

See *opinion of Judge Sibley* (rec. 23).

In *First National Bank* v. *Fellows*, 244 U. S. 417; 61 Law Ed. 1233, at 1239; LRA 1917C 283,
this court, in sustaining the constitutionality of the statute which permitted national banks to act as "trustees, executors, administrators * * * *or any other fiduciary capacity*, in which state banks * * * which come in competition with national banks are permitted to act under the laws of the state in which the national banks are located", evidenced the intention of according to national institutions such power as they must have to succeed in competition with similar state institutions. This is clearly pointed out by Judge Sibley in *Carcaba* v. *McVair*, 68 Fed. (2nd) 795 at 796. (Application for certiorari pending, No. [illegible]06, October term, 1933.)

VIII.

WHEN STATE FUNDS ARE PLACED IN A DESIGNATED DEPOSITORY THE RIGHT TO GIVE SECURITY EXISTS DIRECTLY AND BY IMPLICATION.

Park's Ann. Code, §1252-1254-1256, set out in full, pages 26-27, brief of petitioner in this Court.

Hancock County v. *Hancock National Bank of Sparta*, 67 Fed. (2nd) 421, holds:

> "The statutes authorizing deposits expressly required that the bond be taken before any deposit is made as does the Georgia State depository statute." (A decision involving county deposits in Hancock National Bank.)

This Court has held:

> "A public officer's duty to demand a pledge impliedly gives power to pledge in that specific case." *Texas & Pacific RR.* v. *Pottorf*, 78 L. Ed., p. 519, note 12.

Where state banks are so authorized a national bank may pledge assets to secure funds of a state.

City of Marion v. *Sneeden*, No. 400, decided Feb. 5, 1934; 78 L. Ed. 521.

IX.

THE LIEN IS NOT ULTRA VIRES.

It is contended by petitioner (brief, p. 21), that to construe the statute so as to authorize a lien would have the effect of seriously impairing, if not totally destroying the functioning and usefulness of a national bank. We can add nothing to the clear language used by Judge Sibley, in disposing of this argument in the lower court.

The bond is characterized (bottom p. 15 top 16, brief) as *ultra vires*, absolutely void and a mere nullity—in short, contrary to the public policy of the United States. No facts are given to support this total condemnation of the long adopted practice and statutes of the State of Georgia governing their relations with banks holding public funds. It is not suggested that the Amendment of 1930 is unconstitutional for any particular reason; nor does petitioner advance any solid ground upon which to base his declaration that it is against public policy. After all,

> "public policy of the state or of the nation is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials * * * Courts will not look to other sources to determine the public policy of a state. As was said in *Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul RR Co.*, supra: 'The public policy of a state or nation must be determined by its constitution, laws and judicial decisions—not by the varying opinions "of laymen, lawyers, or judges as to the demands of the interests of the public.'"
>
> *Zeigler* v. *Illinois Trust & Savings Bank*, 245 Ill. 180 (1910) at page 193.

When the matter was before the lower House of Congress this explanation was made:

> "The purpose of the bill is to permit any national banking association to give security in the form required by state law to state banks, to secure the deposit of public funds of a state or any political subdivision thereof."
>
> (See *House Report* 1657, 71st Congress, 2nd Session.)

The public policy relative to qualification of depositories can fairly be ascertained by implication from the authorities formerly quoted and the views of this Court as expressed

in: *National Bank* v. *Graham*, 100 U. S. 699. In that case the bank sued for loss of government bonds; defended on the ground that "it was not authorized to receive bonds and valuables for safekeeping."

In disposing of the question, this Court held (p. 703):

> "The Forty-sixth section of the Banking Act of 1864, reenacted in the Revised Statutes of the United States, §5228, declares that, after the failure of a national bank to pay its circulating notes, etc., it shall not be lawful for the association suffering " 'the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep moneys belonging to it, and to deliver special deposits.' This implied clearly that a national bank, as a part of its legitimate business, may receive such 'special deposits'; and this implication is as effectual as an express declaration of the same thing would have been. *United States* v. *Babbit*, 1 Black 55."

The power of Congress to legislate on the subject being clear, "the choice of means to that end presents a question primarily addressed to the judgment of Congress if it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity; the extent to which they conduce to the end; the closeness of the relationship between the means adopted and the end to be attained, are matters for Congressional determination alone."

Burroughs v. *United States* No. 434, decided January 8, 1934, Vol 78, p. 356 at 360 and 361.

X.

THE GIVING OF SECURITY (OTHER THAN A PLEDGE OF SECONDARY RESERVES) IS WITHIN THE POWER OF NATIONAL BANKS RECEIVING DEPOSITS OF

STATE TAXES WHERE THE LAW REQUIRES SUCH SECURITY.

In petitioner's brief (p. 15), it is assumed that because this Court held, in the cases of Pottorf and the City of Marion, that a national bank did not have the power to secure public deposits by pledge prior to June 25, 1930, it did not have power to give a lien on all of its assets. The conclusion does not follow.

In the Pottorf case the Court was dealing with a private deposit. It specifically left open the power to make pledges for public deposits.[4] Furthermore, the record contained a specific finding, (p. 517), that the transaction challenged was the only instance in which the bank had ever pledged assets. The record here contains no evidence as the court disposed of the matter by striking part of the respondent's pleadings but the Circuit Court of Appeals finds in its opinion that national banks have, for fifty-five years, qualified under the Georgia law.

Neither is the City of Marion case an authority in support of petitioner's contention. In the first place, that case involved power to make a pledge to secure municipal deposits and this Court could have disposed of the matter by accepting the construction placed by the Circuit Court of Appeals on the laws of Illinois. The reasoning supporting the views of the Court is not applicable to the instant case. That case involved a pledge of bonds or secondary reserves which this Court holds is contrary to public policy and good banking practice. The instant case involved the question of whether, where the laws of the State create a general lien on the assets of a bank upon the bank's agreeing to become a depository of state funds, and a national bank accepts the appointment and qualifies as such depository, its act is *ultra vires*.

The City of Marion case does not deny to the national banks the power to create general liens on its assets. The

Note 4. "Whether a national bank could legally engage in such practice we have no occasion to decide." *Pottorf case at 518.*

reasoning of the Court, insofar as it relates to the unwisdom of allowing national banks to divest themselves of their secondary reserves to secure deposits, is not applicable in letter or in spirit.

State banks certainly and presumably national banks, have always been subject to certain general liens in all of their history without impairing their ability to conduct their business in usual course.

In Georgia, and we think the situation there is typic, the State has a general lien for taxes (Georgia Civil Code §3329). Whenever the bank rents a building or room in a building wherein to conduct its banking business, the landlord has a general lien for the rent (Georgia Civil Code §3340). Laborers working in a bank have a general lien for their wages (Civil Code of Ga. §3334). If the bank builds or improves its banking house or other real estate, laborers (Georgia Civil Code §3339) and materialmen (Georgia Civil Code §3352) have, as to the laborers, both a special lien on the building and a general lien on all other property of the bank and as to the materialmen, a special lien on the real estate. If a money judgment or decree is rendered against a bank, it carries with it a general lien on all of the property of the bank (Georgia Civil Code §3330, 5946,5432).

Neither the appointment of a receiver for a national bank nor the rule of equality in distribution prescribed in USCA Title 12, §194 (R. S. 5236) affects such liens or prevents their being given priority in distribution.

Earle v. *Pennsylvania*, 178 U. S. 449; 44L. Ed. 1146.
Scott v. *Armstrong*, 146 U. S. 499, 510; 36 L. Ed. 1059, 1063.

We assume that, from the grant of general powers under USCA, Title 12, §24 (3,7) as well as the special powers as to real estate given by USCA, Title 12, §29, a bank may

either rent a banking house or may build or improve one and may repair or improve any other real estate it may lawfully hold. The courts so hold.

Brown v. *Schiller*, 118 Fed. Rep. 981;
Same Case, 194 U. S. 18; 48 L. Ed. 857.
Weeks v. *International Trust Co.*, 125 Fed. Rep. 370.
Trustees First Presbyterian Church v. *National State Bank*, 57 N. J. Law 27, 29 A. 320, aff'd 58 N. J. L. 406; 36 Atl. 1129.
Cooper v. *Hill*, 94 Fed. Rep. 582.

Out of the contract of lease or repair, liens would arise generally against the bank's assets, through uniform state laws operating upon state and national banks alike. Certainly the existence of such liens has never operated to handicap banks from successfully carrying on the functions for which they are created.

The express power granted national banks in USCA, Title 12, §24 (3), to make contracts and the incidental powers granted sub-division 7 of the same section, confer authority on these banks to do all those things which are "required to meet all legitimate demands of the authorized business and to enable a bank to conduct its affairs within the general scope of its charter safely and prudently.

First National Bank v. *National Exchange Bank*, 92 U. S. 122, 127; 23 L. Ed. 679.
Western National Bank v. *Armstrong*, 152 U. S. 346; 38 L. Ed. 470.
Clement National Bank v. *Vermont*, 231 U. S. 120, 140; 58 L. Ed. 147, 157.

"This necessarily implies a right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others."

Same cases.

Nor does the fact that a lien may arise in favor of the creditor invalidate the liability, if the transaction be otherwise free from impeachment. For example, in recognizing that a national bank may secure an ordinary creditor by pledging its assets, the court recognizes the validity of the pledgee's lien on the assets, even though it be a pledge of all the bank's assets, as was upheld in *Wyman* v. *Wallace*, 201 U. S. 230, 50 L. Ed. 738, cited approvingly in the City of Marion case.

A national bank is expressly authorized to receive deposits. 12 U. S. C. §24 (7). This is one of its most useful and important functions, equally important to the successful operation of the bank as it is to the public.

If state banks in Georgia may enter into the contract with the Governor, prescribed by the statute as a condition precedent to any state money being deposited in the banks, and if national banks cannot do so, the national banks would be deprived of the ability successfully to compete for such deposits. Whenever the bank makes the contract, which the statute requires to be evidenced by a bond, with a surety thereon, by operation of law, a lien arises on all of the assets of the bank, as principal, and of the surety. This is a reasonable safeguard on the part of the State for the protection of its public revenues.

Unless national banks can comply with the statute and give the bond, from the giving of which a general lien by operation of law arises, it cannot become a depository of state funds—its ability to compete with the state banks for these deposits is gone.

It would seem that the statement of Mr. Justice Hughes, respecting a state law affecting the liability of a national bank to the state for taxes on deposits in it, would apply here with equal force, that "provision (in the State law) for such agreements, instead of constituting interference with

a federal instrumentality, would aid it in performing its functions, and would remove unnecessary obstacles to the successful prosecution of its business."

Clement National Bank v. *Vermont*, 231 U. S. 120, bottom p. 140, top page 141; 58 L. Ed. 147, 157, 158.

The Georgia law giving this lien, as it has been correctly construed by the Court of Appeals in the decision of Judge Sibley (who is perhaps the greatest jurist the State of Georgia has ever produced) in this case, does not prevent a bank from freely using its stocks, bonds, promissory notes and other similar assets in which the bank's "secondary reserves" are carried. The title of a pledgee or vendee for value of such securities, in ordinary course of business, would be superior to the State's lien.[5]

For more than fifty years, banks, both state and national, have been qualifying as depositories in Georgia under this statute; and we believe it may be said with all assurance

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Note 5. For more than 100 years it has been recognized that the priority due to the United States (which is not strictly a lien but is of the highest dignity) does not apply to assets of which "the debtor has made a bona fide conveyance * * * to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi fa., the property is divested out of the debtor and cannot be made liable to the United States."

Theleusson, et al., v. *Smith*, 2 Wheat. 396; 4 Law Ed. 271, at 278.

Compare, also, the reasoning of this Court in the recent case of *People of New York* v. *McClay*, 228 U. S. 290; 77 Law Ed. 754.

If the United States may construe its claim of priority so as to permit the debtor to continue in business, no valid reason appears why the State of Georgia cannot in advance, contract with its depository that its lien shall be a general one of the type fully discussed in this brief and that the specific lien shall come into effect when the depository breaches its contract and fails to pay over on demand state funds deposited with it.

that the existence of this lien has never embarrassed any of them in the ordinary operations of the business.

The enactment of the amendment of June 25, 1930, of section 45 of the Banking Act, authorizing national banks to secure public deposits of states and their sub-divisions by pledge of securities is evidence of a congressional finding that it is not inconsistent with the purposes of the National Banking Act or materially hazardous to the safe and prudent conduct of these banks to allow them to divest themselves, by pledge, of such portion of their securities as may be necessary to secure public deposits. We presume that Congress assumed that the visitorial powers of the Comptroller of Currency would be a sufficient safeguard against imprudent transactions of this kind in particular cases.

As Judge Sibley points out in the opinion of the Court of Appeals in this case, if it be consistent with the purposes and safety of national banks to allow them to pledge specific assets (and withdraw from their power of disposition of what the Court in the opinion in the City of Marion case calls the "secondary reserves") it is certainly not inconsistent with the purposes of the Banking Act or hazardous to the safety of the banks to allow them to create the general lien of the nature imposed by the Georgia laws, which do not interfere with the free use of negotiable securities in ordinary course of business.

While the Court of Appeals of the Fifth Circuit in a prior case in which Judge Sibley did not sit (*Pottorf* v. *El Paso-Hudspeth Road District*, 62 F. (2), 498) did express views, as to a national bank's powers to pledge securities to secure a public deposit contrary to the opinion of this Court in the City of Marion case, the burden of Judge Sibley's argument in this case is to show that the reasons for denying the power to pledge do not apply to the power to become a depository with the consequent general floating lien on the bank's assets; and the reasons he

gives seem sound, and such as fully to differentiate this case from the City of Marion case.

Congress has recognized that security may consist by making deposits or it may be done *otherwise. U. S. C. A. Title* 12, §90-91 (Appendix to petitioner's brief, p. 30). In §91, the provision for security is by the requirement of additional deposits of bonds or of lawful money, and the fact that Congress sometimes required a pledge, and at other times permitted other forms of security, is an indication that there is nothing in the public policy of the United States as expressed by Congress which prevents the states from requiring either a pledge or other form of security from their depositories.

The condemnation of secret pledges has no place here. The fact that a national bank is a state depository is a matter brought home to the depositors legally, as well as actually. One who does not shut his eyes to realities of banking business, knows that national banks display on their windows and by other forms of advertisement, the fact that they are state depositories. If this fact does not appear in the published statements, then the criticism is on the department that prescribes the form of the statement rather than the Georgia law. As was well said by Circuit Judge Alschuler in his dissenting opinion in the Sneeden case, 64 Fed.(2nd), at 731.

> "It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks. I fully agree that banks should be required to make frequent public reports of their condition, and that in such reports it should be specifically disclosed what part of the reported assets is so pledged. To my mind it is vicious practice to permit banks to advertise their 'resources' at an amount inclusive of their total deposits, without requiring that at the same time, and quite as

prominently, there be stated the liabilities to which the resources are subject."

To the same effect is the suggestion from the Supreme Court of Tennessee, *Grigsby* v. *Peoples Bank*, 158 Tenn., 11 S. W. (2nd) 673 (1929):

> "Our statutes, requiring periodical published statements of the condition of banks, makes it a serious offense to publish a false statement. Shannon's Ann. Code, Chaps. 2104-2104a4. A true statement would include 'secured deposits' and it is the duty of the banking department of the state to require this in the form which it is authorized to provide for such statements. If this is done, we are unable to see how any hardship can result to unsecured depositors or stockholders further than would result where the bank borrowed a fund and pledged its assets as security."

Inasmuch as the taking of security for public deposits was a practice known to the public, sanctioned by the decisions of the courts, state and federal, and by the practice of the Comptroller of the Currency, the transaction could not be held *ultra vires*, and the bank having received the states's taxes cannot plead *ultra vires*.

American Surety Co. v. *Philippine National Bank*, 166 N. E. 634, citing:

First National Bank of Aiken v. *Mott Iron Works*, 215 U. S. 240; 66 Law Ed. 593.

Scharnick v. *Butler*, 185 N. E. 111.

XI.

VALID LIENS ARE NOT AFFECTED BY CONGRESSIONAL ACTS NOR THE DECISIONS OF THIS COURT.

Scott v. *Armstrong*, 146 U. S. 493; 36 Law Ed. 1063.

A construction of the banking acts so as to exclude all preferences was contended for in the Scott case, *supra*. The exact question was one of set-off. The Court, after examining the relevant acts of Congress providing for ratable dividends and prohibiting preferences, holds:

> "It is insisted that the assets of a bank existing at the time of the act of insolvency include all of its property without regard to any existing liens. * * * *We do not regard this position as tenable.* Undoubtedly any distribution by a national bank being insolvent * * * of its choses in action, made to prevent the application for the payment of its circulating notes or to prefer one creditor to another, is forbidden *but liens, equities* or rights *arising by express agreement* or implied from the nature of the dealings between the parties or by operation of law *prior to insolvency* and not in contemplation thereof *are not invalid.* The provisions of the act are not directed against all liens, securities, pledges or equities whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency." (Italics ours).

Nor is *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; 40 Law Ed. 700, *an authority to the contrary*. That case involved a preference under the New York law of the debt of an insolvent national bank for a deposit by a savings bank. The New York statute providing a different method of distribution to unsecured and ordinary creditors from the provisions of the federal statutes, were held in conflict with them and necessarily invalid. That was because the two statutes covered the identical subject while here the federal statute covers the distribution to depositors and the state statute covers payment to the sovereign who obtained a lien as a condition to making a deposit. To quote from the Davis case:

> "It is clear that these two statutes cover exactly the

same subject matter. Both relate to insolvent banks; both ordained that the right of preference on the one side and the duty of ratable distribution on the other *shall only result from insolvency*; both cover the assets of such bank coming *after* insolvency into the hands of the officer * * * authorized to administer them. The two statutes cover the same subject matter and relate to the same duty."

The court further says: "It cannot be doubted that one of the objects of the national bank system was to secure in the event of insolvency a just and equal distribution of the assets of national banks among all unsecured creditors and to prevent such banks from creating preferences in contemplation of insolvency."

It is apparent that the Court was considering the distribution to unsecured creditors which is provided for by Code §2366, subdivision 70, as amended Ga. Law 1927, pp. 195-199, cited in Luther Williams case. The lien contended for in this case is not part of the banking act except in that the banking act recognizes existing liens. See *Luther Williams Bank & Trust Co.* case, 166 S. E. 260; 45 Ga. App. 231, at page 832.

The Davis case is really an authority in favor of the respondent. It holds (p. 278):

"It is certain that insofar as not repugnant to Acts of Congress the contracts and dealings of national banks are left subject to the state law."

But in holding invalid the New York statute, the Supreme Court points out:

"That statute does not profess to deal with the bank and its relation as a going concern. It wholly and exclusively undertakes to regulate the distribution of assets after insolvency. Insolvency and insolvency alone

is made the criterion *from which the preference is to arise.*"

The mandate runs not to the bank but to the assignee or agent in charge, and

> "There is therefore no room for implying a contract."

It is pointed out that the New York statute does not profess to change the legal relations which result from a (savings) deposit in the bank. However, the court points out, pp. 288-289:

> "True it is that where by state law a *lien is made to result from a particular contract, that lien* when its existence is not incompatible with the Act of Congress, *will be enforced.*"

Scott v. *Armstrong*, above referred to, is discussed in the Davis case, and it is conceded that:

> "Where from the particular facts stated the relation was not that of an *ordinary creditor* but was one giving rise to a specific lien or right resulting from the contract, and which was *in being before* the insolvency took place, then such a relationship will not be disturbed by insolvency."

The proclamation by the State of Georgia naming the Hancock National Bank a public depositary and authorizing the tax-collectors to make payments there instead of directly to the state treasurer (Record, p. 8), and the giving of a lien on its assets by the execution of the bond were, to quote from the Davis case (bottom page 289): "Parts of the same transaction and which each gave credit to the other on the faith of the simultaneous credit."

It is further pointed out that the question in the Davis case is whether a claim existing at the time of insolvency and

up to that date unsecured, shall by the operation of an insolvent statute, be converted *after the insolvency*, into a preferred claim. Clearly it should not be, and the Davis case is based upon the premise above emphasized, to-wit: that an unsecured claim cannot, because of insolvency, become a secured claim.

This Court carefully limits the Davis case to its facts when, in the concluding paragraph it says:

> "Nothing, of course, in this opinion, is intended to deny the operation of general and undiscriminating state laws on contracts of national banks so long as such laws do not conflict with the letter or general objects and purposes of Congressional legislation."

This Court has held:

> "Insolvency gives unsecured creditors no greater rights than they had before." *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 147.

> "Whatever Congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon *contracts* existing between creditors and debtors by anything prescribed in reference to the administration of the assets of insolvent national banks."
>
> *Merrill case*, supra.

Two cases questioning the validity of security for the repayment of public deposits have been before this Court. In each instance *certiorari* was denied.

Mothersead v. *U. S. F. & G. Co.*, 22 Fed. (2nd) 644; (C. C. A. 8, 1927); *certiorari* denied, 276 U. S. 637, a pledge of assets in a state bank.

Pottorf, Receiver, v. *El Paso, etc., Road District*, 62 Fed.

(2nd) 498; case here reported: *Pottorf, Receiver,* v. *Underwriters of Lloyds,* certiorari denied, 288 U. S. 724, Case No. 689.

CONCLUSION

We have endeavored to discuss and refute the points raised by petitioner. To discuss all of the subjects that appear in the brief, would unduly extend this discussion. The issue before the Court is really a narrow one: Is the public policy of Georgia as expressed in the statutes construed below, and as further illustrated by the Act of 1933 (petitioner's brief, p. 28), requiring a lien in favor of the state (and by the Act of 1933 in favor of its subdivisions), as a condition to the deposit in banks of public money, so unreasonable a requirement as to prevent national banks from becoming qualified public depositories?

We recognize the visitorial power of the Comptroller of the Currency over national banks, and that in a proper case the question here raised should be decided. However, we contend that if national banks should not qualify as public depositories in Georgia because of the Comptroller's views of policy this should be disposed of by administrative rulings applicable to the future, and cannot invalidate the rights of the state already accrued. Certainly this should be true as to all money deposited by the state after the adoption of the 1930 amendment.

Compare: *State of Nebraska* v. *First National Bank of Orleans,* 88 Fed. 947.

Where national banks are opposed to the state practice, the lien provided for by state law is not held invalid. On the contrary, to continue business the national bank need not necessarily subject itself to the lien.

Compare: *Abilene National Bank* v. *Doldez,* 179 Fed.

461; *certiorari denied*, 218 U. S. 673; 54 Law Ed. 1205, *citing Noble State Bank* v. *Haskell*, 219 U. S. 105; 55 Law Ed.

This Court has generally affirmed decisions giving effect to equitable liens created by the Act of Legislature on either income or property.

> *Ketchum* v. *City of St. Louis*, 101 U. S. 306; 25 Law Ed. 999.

We may well conclude this brief with a quotation from a decision which was before this Court on an application for certiorari in *Pottorf, Receiver, v. El Paso District*, supra:

> "It would be a narrow and unreasonable view indeed of the powers of a national bank which would defeat a contract for the security of public funds entered into as this one was, for the purpose of complying with statutes governing depositories, openly and above board with the express authority of the directors of the bank, and with the sanction of the department."

Respectfully submitted,

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Atlanta, Ga.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 802.

JOHN C. LEWIS, AS RECEIVER OF THE HANCOCK NATIONAL BANK OF SPARTA, GEORGIA, *Petitioner*,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Respondent*.

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE.

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Comptroller of the Currency.

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INDEX.

	Page
I. Foreword	1
II. Interest of The Comptroller Of The Currency In The Case From An Administrative Standpoint	2
III. Conclusion	4

CASES CITED.

Cook County National Bank vs. United States, 107 U. S. 445	2
Davis vs. Elmira Savings Bank, 161 U. S. 275	2
Easton vs. Iowa, 188 U. S. 220	2
Guthrie vs. Harkness, 199 U. S. 148	2

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BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE.

Comes now J. F. T. O'Connor, Comptroller of the Currency of the United States, and respectfully submits his brief, as *amicus curiae*, in support of the petition for writ of certiorari filed by John C. Lewis, as Receiver of the Hancock National Bank of Sparta, Georgia, in the above entitled cause.

I.

FOREWORD.

Citation of the opinions below, statement concerning the judisdiction of the court to issue writ of certiorari, sum-

mary of the facts, specification of errors, and argument of the issues involved (except as to one point discussed herein), have been fully covered in the record, petition and supporting brief filed by the Receiver of the Hancock National Bank of Sparta, Georgia, and therefore reference is here made to the same in the interest of avoiding repetition.

II.

INTEREST OF THE COMPTROLLER OF THE CURRENCY IN THE CASE FROM AN ADMINISTRATIVE STANDPOINT.

The Comptroller of the Currency is charged with the administration of the National Banking Act which provides for the organization, supervision, and winding up of the affairs of National banks, as in a code by itself (Cook County National Bank v. United States, 107 U. S. 445; Easton v. Iowa, 188 U. S. 220) and his functions, under the law, involve not only the administration and liquidation of the affairs of such banks in Receivership so as to prevent enforcement of invalid liens and preferences (Davis v. Elmira Savings Bank, 161 U. S. 275) and accomplish the pro rata distribution required by law (Section 194, Title 12, U. S. C. A.), but he is also required to exercise exclusive visitorial power over going National banks. (Guthrie v. Harkness, 199 U. S. 148.) The petitioner and more than 1450 similar Receivers are the agents of the Comptroller in winding up the affairs of insolvent National banks under his direction (Section 192, Title 12, U. S. C. A.) and there are approximately 5285 going National banks throughout the United States, including approximately fifty in the State of Georgia, over which the Comptroller exercises visitorial power, in any one of which the question may arise as to the validity of their depository contracts covering moneys of states and sub-divisions thereof and the right of such public depositors to a lien upon the banks assets.

The instant case involves the power of a National bank to give a lien upon its assets as security for a public deposit of a state, and hence is of class importance to both going and closed National banks throughout the country, in addition to being of special importance in relation to National banks located in the State of Georgia and also of primary pecuniary importance to the State of Georgia.

The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court. This court held on February 5, 1934, in the case of City of Marion, Illinois versus Ben Sneeden, Receiver, *et al.*, that prior to the Act of Congress of June 25, 1930, a National bank was without power to pledge assets to secure deposits of a State or its political sub-divisions. In the instant case, decided December 7, 1933, the Court of Appeals reversed the trial court and held valid a contract made on July 12, 1928, by the terms of which a National bank attempted to give a lien on its assets, effective as of July 12, 1928, to secure deposits of the State of Georgia. We submit that this court's decision in the City of Marion case (independent of the assignments of error contained in the Receiver's brief), controls the issues in the instant case and requires the reversal of the decision of the court below.

The opinion of the Circuit Court of Appeals suggests that the Comptroller has approved lien contracts of the character here involved for fifty years. The records of the Comptroller's office do not evidence that the question here involved has ever been presented to the Comptroller for a ruling and that the fact that such a lien can attach to the assets of a National bank has been judicially determined for the first time by the decision of the Circuit Court of Appeals in the instant case.

A decision upon the issues of law involved in the instant case, regardless of whether the decision below be affirmed or reversed, will be of inestimable aid to the Comptroller

of the Currency in supervising going National banks and in winding up the affairs of insolvent National banks and also in administering the affairs of a considerable number of National banks in Conservatorship. If a National bank can contract for a lien on its entire assets to secure a public depositor, as held by the court below, such procedure will most likely be followed in other states, because the lien given avoids all possibility of loss against the hazard now assumed by the United States and public depositors generally that the specific assets pledged may prove inadequate and thus require the depositor thereafter to rely upon dividends in common with the general creditors.

III.

CONCLUSION.

The Comptroller of the Currency therefore earnestly urges this Honorable Court to entertain the petition for writ of certiorari filed by the Receiver in the instant case.

Respectfully submitted,

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Attorneys for J. F. T. O'CONNOR,
Comptroller of the Currency.

SUPREME COURT OF THE UNITED STATES.

No. 802.—October Term, 1934.

John C. Lewis, as Receiver, etc., Petitioner, *vs.* Fidelity & Deposit Co. of Maryland.	On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 4, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

Under statutes of Georgia, in force since 1879, a bank, state or national, may be appointed depository of state funds. To qualify it must give a bond for the faithful performance of its duty. A bond with surety creates a lien on all the bank's assets, both those held at the time of the execution of the bond and those subsequently acquired.[1]

In July, 1928, the Governor of Georgia appointed The Hancock National Bank of Sparta, Georgia, a state depository for the term of four years. It gave a bond with the Fidelity and Deposit Company of Maryland as surety in the sum of $10,000 for the faithful discharge of its duties. From time to time thereafter, until May 23, 1932, the tax collector of Hancock County deposited in the bank

[1] "The bond to be made by the State depositories may be a personal bond or may be made by a deposit with the State treasurer of United States bonds or Georgia State bonds, or either one or both of said methods." Sec. 1256, Code of Georgia (1910). Section 1252 provides that the depository bond shall have "the same binding force and effect as the bond required by law to be given by State treasurers, and, in case of default shall be enforced in like manner." Section 218 of the Code relating to the treasurer's bond provides that "a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof." The Supreme Court of Georgia held, in cases involving state banks, that under these statutes the State acquires a lien on all the assets of a depository bank, both those at the time of the execution of the bond and those subsequently acquired. See Seay *v.* Bank of Rome, 60 Ga. 609; Colquitt, Governor *v.* Simpson, 72 Ga. 501; Simpson *v.* Ledbetter, 79 Ga. 159. Compare State *v.* Brobston, Receiver, 94 Ga. 95; Standard Accident Ins. Co. *v.* Luther Williams Bank & Trust Co., 45 Ga. App. 831.

moneys collected on account of state taxes. On that day the Comptroller of the Currency declared the bank insolvent and appointed a receiver for whom the petitioner, John C. Lewis, was later substituted. The amount of state funds then on deposit was $6,157.41. This sum, and the accrued interest, the company paid to the State and received an assignment of its rights arising out of the deposit. Then, the company brought in the federal court for the Middle District of Georgia this suit in equity against the receiver to enforce a lien for the amount upon all the assets in his hands, claiming priority according to the date of the bond.

The District Court, after denying a motion to dismiss, heard the cause substantially upon agreed facts. It ruled that the company was entitled to the rights of the State by subrogation and by transfer; held that neither the State nor the company was entitled to a lien or to preferential treatment; and allowed the claim as one entitled merely to a *pro rata* dividend. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment and remanded the cause for further proceedings, holding that the asserted lien was valid, subsisting in favor of the company, and entitled to the priority claimed. 67 F. (2d) 961. This Court granted certiorari. 291 U. S. —.

That court, following *Pottorff* v. *El Paso-Hudspeth Road District*, 62 F. (2d) 498, ruled, as matter of federal law, that national banks had under National Bank Act as enacted in 1864 power to pledge assets to secure public deposits. It ruled as matter of state law that the lien is a contractual one arising, not *proprio vigore* by reason of the statutes, but by contract of the bank as an incident of giving a personal bond; that these statutes apply to both state and national banks and the scope of the lien is the same in respect to both; declared, in describing its character, that from the date of the bond the lien attaches to all property real and personal then owned or thereafter acquired; that a grantee of real estate having constructive notice would take subject to the lien; that as to money, bonds, stocks, notes, drafts and other choses in action, the lien of the State is inferior to the rights of third persons who receive the property *bona fide* in the ordinary course of business prior to insolvency or sequestration; and that the lien is inferior even to the right of depositors to set-off against their own indebtedness that of the bank to them.

The court took judicial notice of the fact that throughout the fifty-three years since the enactment of the law both national and state banks had acted as state depositories; that the lien had been enforced against money and choses in action when captured by a receivership, but had never been asserted as to commercial assets transferred in due course of business; that the existence of the lien had presented no obstacle to the ordinary operations of the banking business or interfered in any way with the performance by national banks of their federal functions; and that a bank's appointment as state depository is customarily advertised and accepted as evidence of soundness and credit. Compare *In re Blalock*, 31 F. (2d) 612.

In *Texas & Pacific Ry. Co.* v. *L. O. Pottorff*, 291 U. S. 245, and *City of Marion* v. *Ben Sneeden*, 291 U. S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress. It follows that, in 1928, no lien arose when the bank was appointed depository; and that the judgment of the Circuit Court of Appeals must be reversed unless the Act of June 25, 1930, c. 604, 46 Stat. 809, authorizes a national bank to give as security a general lien of the character prescribed by the Georgia statutes.

That Act provides:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

First. The receiver contends that the Act of 1930 should be construed as authorizing merely a pledge of specific assets to secure public deposits; and that the giving of a general lien upon the bank's assets is still *ultra vires*. The language of the Act is broad enough to authorize giving a general lien on present and future assets, wherever banks organized under the laws of the State have such power; and it should be given that construction. For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in com-

peting for deposits. The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation.[2] In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary;[4] in those concerning interest on deposits;[5] and in those concerning capitalization.[6] It appears also to have been of some influence in securing the grant in 1913 of the power to loan on mortgage.[7] Compare *Fidelity & Deposit Co.* v. *Kokrda*, 66 F. (2d) 641, 642.

Second. The receiver insists that, even if the Act of 1930 authorizes the giving of a general lien, the lien here asserted must fail because there are provisions in the Georgia law inconsistent with the National Bank Act and because obligations are imposed upon state depositories with which no national bank may comply.

1. Attention is called specifically to the terms of the statutory bond which is conditioned "for the faithful performance of all such duties as shall be required" of the depository "by the General Assembly or the laws of this State." The argument is that a national bank is an instrumentality of the United States and cannot subject itself by contract to the laws of a State. But a national bank is subject to state law unless that law interferes with the

[2]Acts of June 3, 1864, c. 106, § 41, 13 Stat. 99, 111; Feb. 10, 1868, c. 7, 15 Stat. 34; R. S. § 5219; Mar. 25, 1926, c. 88, 44 Stat. 223. See Van Allen *v.* Assessors, 3 Wall. 573; Mercantile Bank *v.* New York, 121 U. S. 138; First National Bank *v.* Hartford, 273 U. S. 548.

[3]Acts of Feb. 25, 1927, c. 191, § 7, 44 Stat. 1224, 1228; June 16, 1933, c. 89, § 23, 48 Stat. 162, 189. See 36 Op. Atty. Gen. 116, 344.

[4]Acts of Dec. 23, 1913, c. 6, § 11(k), 38 Stat. 251, 262; Sept. 26, 1918, c. 177, § 2, 40 Stat. 967, 968; compare June 16, 1933, c. 89, § 24 (a, b), 48 Stat. 162, 190. See First National Bank *v.* Fellows, 244 U. S. 416; Burnes National Bank *v.* Duncan, 265 U. S. 17.

[5]Acts Feb. 25, 1927, c. 191, § 16, 44 Stat. 1224, 1232 (to pay no greater interest on time and savings deposits than state banks); and note in particular June 16, 1933, c. 89, § 11 (b), 48 Stat. 162, 181 in which national banks are forbidden to pay interest on demand deposits except on deposits of state, county, etc., where state law demands it.

[6]Act of Feb. 25, 1927, c. 191, § 4, 44 Stat. 1224, 1227.

[7]Acts of Dec. 23, 1913, c. 6, § 24, 38 Stat. 251 273 (see 50 Cong. Rec. 4819; 51 Cong. Rec. 1189); Sept. 7, 1916, c. 461, 39 Stat. 752, 754 (64th Cong., 1st Sess., see Report No. 481, p. 14); Feb. 25, 1927, c. 191, § 16, 44 Stat. 1224, 1232. See First National Bank *v.* Anderson, 269 U. S. 341, 354; First National Bank *v.* Hartford, 273 U. S. 548, 558.

purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law. *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *McClellan* v. *Chipman*, 164 U. S. 347, 356; *First National Bank* v. *Missouri*, 263 U. S. 640, 656. What obligations to the State the bank assumes may be defined by the law of that State. It is quite possible that the legislature might attempt to impose, under the conditions of the bond, a duty which the bank would be without authority to undertake; and to that extent the contract would be unenforceable. But it is not shown that the obligations as now defined by the courts of Georgia are contrary to anything in the National Bank Act. Moreover, the state court, which would be the controlling authority on the question, might decide that the failure of part of the consideration to be given would not invalidate the appointment.

2. It is urged that acceptance of the appointment as state depository is incompatible with the functions of a national bank, because under § 224 of the Georgia Code it has been held that the Governor may issue a *fieri facias* against the depository bank for the amount due to the State, whereas, Revised Statutes, § 5242, provides that "no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court."[8] Assuming, without deciding, that there is such conflict, it is not material here. Section 224 of the Code provides merely a method of enforcing the bond which has not been used here, and hence against which there is at present no occasion for complaint.

3. It is contended that the lower court erred in its rulings on the Georgia law; that under the state statutes, properly construed, the lien attaches to all kinds of property from the date of the bond; that it applies to real estate and other tangible property, to money, bonds, stocks, notes, drafts and other choses in action then owned or thereafter acquired by the bank, and that it is not defeated even by a *bona fide* sale or other disposition of such property in the ordinary course of business; that, consequently, the general lien would present an insuperable obstacle to the bank's serving the public in its ordinary business operations; that the bank could not sell the property it was authorized to acquire, for no one would take it subject to the lien; that the general lien

[8] Act of March 3, 1873, c. 269, § 2, 17 Stat. 603; R. S. § 5242.

would prevent the pledge of specific bonds or other securities required in order to secure the deposits of the United States and federal agencies pursuant to provisions of the National Bank Act as amended;[9] and that it would prevent the pledge of specific security required to authorize the issue of circulating notes.[10] The lower court took judicial notice of the fact that for more than half a century the general lien described has been in force, and has not interfered with the performance by banks of their duties to the public; and that national banks while serving as depositories have not, so far as appears, ever been confronted with a conflict between their duties to the State and to the United States. The reasons given by that court for its conclusions as to the operation and effect of the lien under the law of Georgia are set forth fully and persuasively in the opinion of the Circuit Court of Appeals. We cannot say that it erred in the conclusions reached either as to the state law, or as to the facts. Compare *City of Marion* v. *Sneeden*, 291 U. S. 262, 270-271.

4. The receiver contends that the lien, if limited in its operation upon commercial assets to such moneys, stocks, bonds, notes, drafts and other choses in action as are captured by a receivership, is not a true security at all; that if so limited the alleged lien would, in the event of insolvency, be legally a preference; that to give it effect would conflict with the policy expressed in § 50 of the National Bank Act[11] which forbids preferences made in view of insolvency; and that Congress cannot be assumed to have sanctioned a transaction which though in form a security is in essence a preference.

Sections 50 and 52 do not prohibit liens given prior to insolvency and not in contemplation thereof, whether they arise from express agreements, or are implied from the nature of the dealings between parties, or arise by operation of law. *Scott* v. *Armstrong*, 146 U. S. 499, 510; *Earle* v. *Pennsylvania*, 178 U. S. 449, 454. The lien here asserted arises out of an agreement executed at a time when there was no question of insolvency; nor is it restricted in its operation to the event of insolvency. It may be exercised by execution or otherwise whenever the bank refuses to pay. It resembles the lien which is enforced when seizure is made by the creditor

[9] Act of June 3, 1864, c. 106, § 45, 13 Stat. 99, 113.
[10] Act of March 14, 1900, c. 41, § 12, 31 Stat. 45, 49.
[11] Act of June 3, 1864, c. 106, § 50, 13 Stat. 99, 114; R. S. § 5236.

within four months of bankruptcy, of property claimed under an after-acquired property clause of a mortgage; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tatman*, 198 U. S. 91.[12] It resembles also those cases where, under the common law of distress or under a statutory lien, described by the courts as "inchoate" or "dormant", a landlord, within four months of bankruptcy, seizing or levying upon whatever property was on the tenant's premises, was held to have a valid lien. *Henderson* v. *Mayer*, 225 U. S. 631; *Richmond* v. *Bird*, 249 U. S. 174. Compare *Minnich* v. *Gardner*, No. 669, decided April 2, 1934. The case at bar is unlike *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, relied upon by the receiver, where a New York statute dealing with the administration of insolvent banks provided that in the event of insolvency the deposits of a savings bank would be entitled to a preference.

5. The receiver contends that, under a proper interpretation of the state depository statute, no lien whatever is intended or arises when a national bank gives a bond to secure state deposits, because the bond required of a national bank is more onerous than that required of a state bank.

The bond of the national bank must be double the amount of the deposit; of the state bank only equal to it. The lien is security for the bond, not the deposit; thus in the case of a national bank, if the provision were applicable, the lien would be twice the amount of the deposit. As the court below noted, the double bond may have been thought necessary because the State has not the power to examine national banks. But whatever the occasion for the difference, it does not appear to conflict with or cloud the clear statement of the statute attaching the lien to depository bonds as such and without qualifications. The ultimate decision of this question is for the Supreme Court of Georgia but until it decides otherwise we see no reason for not accepting the holding of the court below as correct.

Third. The receiver contends that even if national banks are authorized under the 1930 Act to give a general lien upon their assets of the character described by the Circuit Court of Appeals, the judgment should be reversed because the bond antedated the

[12] Compare In re Ball, 123 Fed. 164; In re Rogers, 132 Fed. 560; Wood *v.* United States Fidelity, etc. Co., 143 Fed. 424; In re Glover Specialties Co., 18 F. (2d) 314; In re Riggi Bros. Co., 42 F. (2d) 174.

Act. It appears that the balance on hand June 25, 1930, was withdrawn soon thereafter; that between June 25, 1930 and the appointment of the receiver, May 23, 1932, deposits were regularly made aggregating a large sum; that from time to time checks were drawn against these deposits; and that all of the balance in bank when the receiver was appointed represented deposits made after the passage of the Act.[13] The appointment of the bank as depository in 1928 and the bond were to cover a period of four years. Though the lien was in form security for the bond, the extent of liability was to be measured by the unpaid balance. Thus, the transaction was not completed in 1928; it was contemplated that there would be continuous dealings between the parties for four years. In fact, the relation continued until the appointment of the receiver. Throughout the whole period the parties intended that the lien should be operative and supposed that it was. The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the Act. A statute is not retroactive merely because it draws upon antecedent facts for its operation. Compare *Cox* v. *Hart*, 260 U. S. 427, 435; *Ewell* v. *Daggs*, 108 U. S. 143; *Petterson* v. *Berry*, 125 Fed. 902; *Hartford Fire Insurance Co.* v. *Chicago, M. & St. P. Ry. Co.*, 62 Fed. 904, 910; *Rosenplanter* v. *Provident Savings etc. Soc.*, 96 Fed. 721. It was not necessary to go through the form of executing a new bond. Compare *Jones* v. *Guaranty and Indemnity Co.*, 101 U. S. 622, 627. We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date. Compare *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 488; *West Side Belt R. R.* v. *Pittsburg Construction Co.*, 219 U. S. 92; *Charlotte Harbor & Northern Ry* v. *Welles*, 260 U. S. 8.

Affirmed.

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[13]The facts concerning the dates of the deposits and the amounts were supplied by counsel for the Comptroller of the Currency who joined with counsel for petitioners in briefs and argument.